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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LDB CORPORATION,

Petitioner,

v.

GIBRALTAR SAVINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals violated the Seventh Amendment right to trial by jury when it (a) affirmed a judgment of fraud liability based on alleged misrepresentations which were not embodied in the jury interrogatory on which affirmance was based, and which the district court refused to submit to the jury, and (b) directed the entry of a damage award on a different theory and in a different amount than the verdict actually returned by the jury.

PARTIES TO THE PROCEEDING

In addition to the named parties, Lloyd D. Brinkman was cross-appellee in the court of appeals, and is also an affiliate of the petitioner.

After the filing of the briefs below, petitioner changed its name from LDBrinkman Corporation to LDB Corporation, and the latter name is used in this petition. The petitioner has six wholly owned subsidiaries.

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LDB CORPORATION,

Petitioner,

v.

GIBRALTAR SAVINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LDB Corporation hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on December 2, 1988, which affirmed in part and reversed in part a decision of the United States District Court for the Western District of Texas and remanded the case to the district court for further proceedings.

OPINIONS BELOW

The amended opinion of the court of appeals, App. 1a-65a, is reported at 860 F.2d 1275. The amended opinion of the district court, App. 70a-74a, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1988. App. 66a-67a. The order of the court of appeals denying rehearing was entered on December 30, 1988. App. 68a-69a. On March 17, 1989, Mr. Justice White entered an order extending the time for filing a petition to and including April 14, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the Constitution provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT

This petition seeks review of a portion of a decision by the United States Court of Appeals for the Fifth Circuit affirming the district court judgment of liability against petitioner, then known as LDBrinkman Corporation, on the theory of fraud, and remanding the case to the district judge for recalculation of damages.[1] The judgment against petitioner grows out of a transaction in which BDI, an indirect subsidiary of petitioner, borrowed $5 million from the respondent Gibraltar Savings. BI, another of petitioner's subsidiaries (and the owner of BDI), and two individuals (Woody and McDougal) were

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[1] Petitioner is unsure whether the court of appeals' recalculation of damages applies to the fraud theory only, or also to the theory of tortious interference with contract on which the jury found liability but awarded no damages. *See, infra*, p. 7. To the extent that the judgment has the latter effect, this petition seeks review of that action.

guarantors on the note.[2] Other parties have been involved in earlier stages of this litigation, and various theories of liability have been advanced.[3] For purposes of this

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[2] At the time the loan was made, Lloyd D. Brinkman was the controlling beneficial owner of petitioner, then known as LDBrinkman Corp. LDBrinkman Corp., in turn, was the sole owner of BI, which owned all of the stock of the borrower, BDI. Ben D. Woody and Delbert G. McDougal were both guarantors on the loan and Woody was a director of BDI. The corporate structure, as far as relevant here, can thus be presented as follows:

Lloyd D. Brinkman
|
LDB Corp., formerly known as LDBrinkman Corporation
(Petitioner)
|
Brinkcraft, Inc. (BI)
(guarantor)
|
Brinkcraft Development, Inc. (BDI)
(borrower)
(Woody and McDougal, guarantors)

See App. 5a.

[3] In addition to petitioner, Gibraltar sued Lloyd D. Brinkman, BI, BDI, Woody and McDougal in federal district court. BI and BDI declared bankruptcy and Gibraltar obtained an agreed judgment in bankruptcy against their corporate successors in the amount of $5,000,000 plus $5,000 attorneys' fees. Gibraltar settled for $350,000 each with Woody and McDougal, and Gibraltar received an assignment from them of their interests in certain real estate development partnerships, in which BI, Woody and McDougal were partners. Following trial, judgment was entered in favor of defendant Lloyd D. Brinkman on all theories of liability. App. 70a-74a.

In addition to the fraud and tortious interference theories discussed here, respondent sought damages against petitioner and Lloyd D. Brinkman on an alter ego theory and for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.* The jury found no RICO violations. App. 79a. The jury's finding of liability as to petitioner (but not Lloyd D. Brinkman) on the alter ego theory was set aside by the district court, which action was affirmed on appeal. App. 18a. Petitioner counterclaimed for usury, which claim was rejected by both the trial and appellate courts. App. 42a-45a. The district court also entered

petition, consideration need be given only to the allegations of fraud and tortious interference with contract in connection with the failure of BDI to repay the $5 million note.

The negotiation and execution of the loan from Gibraltar to BDI took place in August and September, 1984. The loan discussions were conducted between Frederick Farlow, a Gibraltar Savings loan production officer, and Thomas Ratcliffe, a director of BI and petitioner's chief financial officer. App. 9a. Extensive evidence was presented at the trial relating to the respondent's allegations that the petitioner fraudulently induced respondent to make the loan through misrepresentations made during the loan negotiations. App. 8a-12a. Evidence was also introduced concerning allegations by Gibraltar that the petitioner tortiously interfered with BDI's performance of its obligations under the note. App. 47a.

The case was submitted to the jury on interrogatories concerning five alleged misrepresentations made by Ratcliffe to Farlow during the loan discussions. App. 75a-79a. The jury found liability on the first two fraud interrogatories, but not the third, fourth or fifth. App. 75a-76a. The respondent proposed, but the district court declined to submit to the jury a sixth interrogatory concerning an alleged promise that petitioner would not sell or dispose of BI until the loan was repaid. App. 80a. On the fraud claim, the jury was instructed on an out-of-pocket theory of damages and the jury assessed damages in the amount of $6 million. App. 76a. The jury also found that the petitioner wrongfully interfered with BDI's performance of its contractual obligations under the note, but, under a distinct, benefit-of-the-bargain damages instruction, found that there were no damages on the wrongful interference claim. App. 77a. The district court entered judgment in favor of respondent and

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an attorneys' fee award against the petitioner, which was reversed by the court of appeals. App. 40a-42a.

against the petitioner in the amount of $6 million. App. 70a-74a.

The petitioner took an appeal from the district court judgment to the United States Court of Appeals for the Fifth Circuit. That court set aside the finding of fraud under the first interrogatory, App. 50a-52a, leaving only the second interrogatory as the basis for the $6 million fraud damages award. In that interrogatory the jury found that Gibraltar was defrauded by a representation that the business of BI and BDI was "ongoing and successful in scope." App. 75a. In upholding the fraud judgment based on this second interrogatory, the court of appeals discussed at length and relied explicitly on statements in addition to the "ongoing and successful" representation that the jury found.

Specifically, the court of appeals rejected petitioner's contention that the "ongoing and successful" statement was an ambiguous statement of opinion and therefore was legally insufficient to support a fraud claim. In doing so, the court reviewed the evidence, offered at trial, of promises allegedly made by petitioner not to sell or dispose of BI and BDI, and to support them financially until the loan was repaid. App. 53a-60a. The court treated the jury's verdict as embodying statements beyond the finding of the jury in the interrogatory that the business of BI and BDI was "ongoing and successful":

> The debate thus is over the characterization of Ratcliffe's representations that the Brinkcraft subsidiaries were "ongoing and successful" *and that LDBrinkman Corp. would continue to finance them so long as Gibraltar's loan was outstanding.*

App. 53a (emphasis added). The court also relied upon "LDBrinkman Corp.'s promise to keep the subsidiary viable until the loan was repaid," App. 56a, as the basis for concluding that the requirement that the " 'false promises' be reckless or with knowledge of their falsity"

was satisfied. App. 56a. In finding knowing and reckless falsehood, the court thus looked to the evidence presented that petitioner had made a decision to sell or dispose of BI before the loan was made.[4] App. 56a. The jury made no finding as to either the alleged underlying promise or any prior decision to sell BI.

With regard to the jury's award of damages, the court of appeals first rejected the out-of-pocket theory on which the jury had been instructed with reference to the fraud claim. App. 62a. The court nonetheless proceeded to analyze and modify the $6 million verdict returned by the jury under that instruction. It found it "quite apparent" that the jury had included in the verdict a component of prejudgment interest in addition to the $5 million loan. App. 63a. While finding the inclusion of interest permissible in principle, the court of appeals directed that the jury's "error" in "apparently select[ing]" an interest rate somewhat higher than that provided in the note "must be reformed."[5] App. 63a-64a. It also concluded that "[a]djustment in accordance with actual dam-

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[4] In a footnote, among many other references to the alleged promise to retain and support the subsidiaries, the court also stated:

> Ratcliffe's representations that BI and BDI were ongoing and successful in scope likewise were false representations, both of existing fact and as to LDBrinkman Corp.'s and Brinkman's secret intention not to perform. As evidenced by internal memoranda, LDBrinkman Corp. had determined, as early as March 1984, that BI was unprofitable and began its efforts to get rid of the subsidiary while negotiating with Gibraltar.

App. 55a n.47. The final sentence in this quotation from the opinion of the court below relates precisely to the subject of the interrogatory which was rejected by the district court and never submitted to the jury. *See* App. 80a.

[5] The court noted that "[t]he jury knew that the interest accrued and unpaid at the time of trial was $787,226." App. 63a.

ages also appears to be appropriate," and directed the district court, on remand "for this limited purpose only," to "reduce the judgment by the amounts, if any, which Gibraltar has been paid by Woody, McDougal, and/or BDI, BI, and their successors." [6] App. 64a.

In discussing the jury's verdict of liability for tortious interference with contract, the court concluded that "this jury finding was supported by the evidence, and that judgment—in an amount as will be discussed—on this verdict is appropriate." App. 47a. The court also stated that "[t]he finding that Gibraltar sustained no damage is inconsistent with the finding of interference," but reconciled the inconsistency by inferring that the jury evidently intended to avoid a double recovery. App. 48a. The court did not elsewhere explicitly discuss the issue of damages in the context of the tortious interference claim. In revising the jury's $6 million verdict as to the fraud damage award, App. 61a-64a, the court did not state whether its analysis also constituted a revision of the jury's zero damages verdict as to the tortious interference claim.[7]

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[6] The court of appeals noted in conclusion that:

> In summary, the district court correctly entered judgment in favor of Gibraltar and against LDBrinkman Corporation for $5,000,000, representing the principle amount due on the Gibraltar note from BDI.

App. 64a. In fact, however, the district court had entered judgment in the amount of $6 million. App. 72a.

[7] The court of appeals stated that "the jury awarded Gibraltar Savings $6 million against the defendants as the borrower's (and its parent-guarantor's) 'alter ego,' *and for both fraud and tortious interference with the borrower's contractual relationships. . . .*" App. 3a (emphasis added). In fact, the jury had awarded no damages on the tortious interference claim. App. 77a.

The court of appeals also stated that the district court had entered judgment on the fraud charge "and upon a finding of tortious interference with contractual relations." App. 3a. In fact, the Amended Final Judgment of the district court made no refer-

REASONS FOR GRANTING THE WRIT

I. COURTS MAY DETERMINE FACTUAL ISSUES TO WHICH THE RIGHT OF TRIAL BY JURY IS APPLICABLE ONLY WHERE THE JURY COULD NOT REASONABLY REACH ANY OTHER CONCLUSION

The Seventh Amendment's guarantee of trial by jury is faithfully reflected in Rule 38 of the Federal Rules of Civil Procedure which expressly provides that the right "shall be preserved to the parties inviolate." This Court has construed these provisions as requiring a jury trial on factual issues for which a jury trial would have been available in 1791. *Galloway* v. *United States*, 319 U.S. 372, 390-392 (1943). In interpreting the Seventh Amendment following the merger of law and equity under the Federal Rules of Civil Procedure, *see* Rule 1, and in the face of evolving procedures, the Court's decisions make clear that "[t]he federal policy favoring jury trials is of historic and continuing strength." *Simler* v. *Conner*, 372 U.S. 221, 222 (1963).

The right to a jury trial does allow the use of a number of procedural devices which, while leaving fact issues to the jury, allow the courts to intervene on questions of law, such as the existence of adequate evidence to support the verdict of the jury. In particular, summary judgment,[8] directed verdict,[9] and judgment notwithstanding the verdict,[10] are procedures that are accepted as con-

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ence whatever to either the plaintiff's claim of tortious interference with contract or the jury's findings on that claim. App. 70a-74a.

[8] *E.g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). *See* Fed. R. Civ. P. 56.

[9] *Galloway* v. *United States*, 319 U.S. at 396. *See* Fed. R. Civ. P. 50(a).

[10] *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 659-660 (1935). *See* Fed. R. Civ. P. 50(b).

sistent with the Seventh Amendment though they have the effect of taking the final decision on a particular issue away from the jury. In upholding these procedures and articulating the reasons for doing so, the Court has clearly limited the role that district courts may play in factual determinations where a right to a jury trial under the Seventh Amendment is applicable.

With regard to such issues, the trial court's role is limited to rulings of law with regard to the sufficiency of the evidence. The judge may only determine the legal question whether there is a colorable issue of fact to be resolved. In the context of summary judgment, an issue may be removed from the jury only where "there is no genuine issue as to any material fact," so that "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. Such a genuine issue is lacking when no "fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Similarly, with regard to motions for directed verdict and judgment notwithstanding the verdict, the test is whether "the evidence is such that without weighing the credibiiity of the witnesses there can be but one reasonable conclusion as to the verdict." [11] *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-480 (1943); *Berry* v. *United States*, 312 U.S. 450, 453, 456 (1941).

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[11] The limitations on the district court's role in finding facts are further defined by this Court's decisions concerning the procedures of remittitur and additur. The Court has upheld the former procedure, which involves a conditional order of a new trial, to be vacated if the plaintiff agrees to remit a specified amount of the jury award. *Gila Valley, G. & N. Ry. Co.* v. *Hall*, 232 U.S. 94, 103-105 (1914); *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, 646-647 (1886). At the same time, it has struck down the procedure of additur as inconsistent with the Seventh Amendment right to a jury trial, relying on distinctions both of historical practice at common law, and on the greater intrusion on jury prerogatives occasioned by adding to, as compared with subtracting from, the jury's award. *Dimick* v. *Schiedt*, 293 U.S. 474, 482, 486 (1935).

The present case involves action not by the trial judge, but by the court of appeals on review of a jury's verdict. The Seventh Amendment's prohibition on reexamination of jury verdicts by a "Court of the United States" of course applies to action by the courts of appeals. *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355, 358-359 (1962). In general, by virtue of their lack of direct familiarity with the evidence in issue, appellate courts must exercise even greater restraint than trial judges in resolving on legal grounds asserted issues of fact.[12] The Seventh Amendment limitation on appellate review of jury verdicts is long recognized, *Parsons* v. *Bedford*, 3 Peters 433 (1830), though only infrequently discussed by this Court. *E.g.*, *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959) (reversing on Seventh Amendment grounds decision of appellate court that plaintiff's evidence was insufficient to support the verdict); *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957) (same). Where a jury has entered a verdict making particular findings on issues as to which the jury right is applicable, the court of appeals is certainly no more entitled than the district court on a motion for directed verdict or judgment notwithstanding the verdict to reexamine or add to those findings.[13]

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[12] One manifestation of this more limited role of the appellate courts is the requirement that a party seek not only a directed verdict but also a judgment notwithstanding the verdict in order to preserve for appellate review the issue of the denial of the directed verdict. *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, 572-574 (1948); *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947).

[13] As this Court stated in *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355, 358-359 (1962):

> We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amend-

The next section shows by references to the record and the proceedings below, that the court of appeals in fact reached its decision by a process which usurps the role of the jury in civil cases under the Seventh Amendment.

II. THE JUDGMENT OF THE COURT OF APPEALS RESTS ON FACT-FINDINGS ON ISSUES THAT WERE NEVER SUBMITTED TO THE JURY, AS TO WHICH REASONABLE JURORS MIGHT DISAGREE

The court of appeals in this case has lost touch with the proper role of judges in reviewing jury verdicts, and has, in at least two respects, violated the Seventh Amendment right to trial by jury.

A. Summary

First, in affirming a judgment of liability against petitioner on a theory of fraud, the court of appeals found and relied upon facts additional to those found by the jury in response to the interrogatories submitted to it. App. 48a-60a.

Second, though it declined to sustain the jury's finding of damages in the amount of $6 million with regard to the fraud claim, the court of appeals did not remand the case for a new trial on that issue, but rather directed the district judge to recalculate the amount under a different theory than the one on which the damage issue was submitted to the jury.[14]

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ment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

[14] To the extent that the court of appeals did in fact substitute its own multi-million dollar award for the jury's award of no damages with regard to the tortious interference claim, *see* p. 7, *supra*, we seek the Court's review of that aspect of the judgment as well.

At no point in its opinion did the court of appeals acknowledge the principle that the role of judges in directing verdicts on factual issues is limited to situations where no reasonable fact-finder could conclude otherwise. Rather, the court simply reviewed the factual record and relied on its own over-all *de novo* assessment to supplement or replace the jury's verdict. These factual findings by the court of appeals, entered to support a judgment for the plaintiff on whom the burden of proof rests, cannot possibly be justified as the only conclusions that the jury could reasonably have reached.

B. Fraud Liability

The court of appeals affirmed the finding of liability under the fraud theory, based on the answer to a single jury interrogatory finding that "LDBrinkman Corporation committed fraud against Gilbraltar Savings by making" a misrepresentation "That the business of Brinkcraft, Inc. [BI] and Brinkcraft Development, Inc. [BDI] was ongoing and successful in scope." App. 70a-71a. Instead of focusing on the sufficiency of that fact found by the jury to support the judgment, the court of appeals relied on other statements, introduced in evidence but never found by the jury, in order to sustain liability.[15]

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[15] Neither the court below nor Gibraltar has at any point suggested that the possibility of fraud based on statements other than those submitted to the jury was an issue on which the right to trial by jury was waived under Rule 49(a) Fed. R. Civ. P.

The trial judge explicitly refused the respondent's request to present to the jury a claim of fraud based on the very statement on which the court of appeals ultimately relied. App. 80a. This amounted to the direction of a verdict for the petitioner (and the other defendant) on that issue. Thus, the omitted issue here was a *distinct* basis for a fraud claim, on which the district court had already made a ruling adverse to the respondent. In this situation, the district court could not be deemed under Rule 49(a) to have made a finding on the omitted claim "in accord with the judgment on the special verdict." This separate claim was not encompassed within the jury's verdict as a matter of logical or legal necessity

Had the jury returned a general verdict finding fraud on the basis of all evidence presented, the court would have been justified in examining the entire record for evidence to support that verdict. But where, as here, the jury found fraud liability explicitly resting on a particular representation, the court may not support the judgment by making and relying on fact-findings on issues that were never presented to the jury.

The court of appeals, by looking generally at the evidence at trial, rewrote the jury's interrogatory response in a much broader form than the language itself will bear. Relying on evidence that petitioner had in fact decided to divest itself of BI (and therefore of BI's wholly owned subsidiary, BDI) prior to completion of the loan transaction, the court of appeals concluded:

> The debate thus is over the characterization of Ratcliffe's representations that the Brinkcraft subsidiaries were "ongoing and successful" *and that LD Brinkman Corp. would continue to finance them so long as Gibraltar's loan was outstanding.*

App. 53a (emphasis added). The court relied heavily on the statement emphasized above—the alleged promise to retain and fund the subsidiaries—even though the jury neither returned a general verdict nor responded to an interrogatory dealing with whether any such promise had been made.

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or possibility. Thus, neither the jury's verdict nor the district court's judgment provide any basis for deeming the district court to have made a finding on this claim "in accord with the judgment on the special verdict."

The district court's action in refusing to present the claim to the jury may (or may not) have been correct, but it was a ruling of the court which disposed of the issue at trial. If the district court's action was wrong, it would at most warrant a new trial. There is no basis on which the trial court's decision on this claim could have given the court of appeals authority to go beyond the jury's actual verdict and to make its own *de novo* appraisal on the issue decided by the district court, thus, in effect, directing a verdict the other way.

Petitioner argued in the court of appeals that the "ongoing and successful" statement was non-actionable under Texas law, on grounds of ambiguity and vagueness, or as an opinion or prediction of future prospects.[16] The court rejected this contention on the ground that what really was in issue was Gibraltar's assertion of a promise by petitioner to "continue its financial support of the subsidiaries until the loan was repaid." App., 54a. In reviewing the sufficiency of the evidence to support the fraud claim, the court of appeals did not focus on the statement actually found by the jury—that the subsidiaries were in fact "ongoing and successful"—but rather on the alleged promise to maintain the subsidiaries in the future. It also relied on the "overwhelming" evidence that petitioner intended at the time of the loan to violate that commitment by selling BI (the parent of BDI) to two of its officers. App. 55a-56a. For that reason the court of appeals concluded that the representations "that both BI and BDI were ongoing and would be allowed to operate, grow, and successfully repay their outside liabilities" were "false promises" satisfying the requirement of reckless or knowing falsehood.[17] App. 56a.

These "false promises" were never found by the jury, either as facts, or as a basis for liability on the fraud claim. Nor are such promises logically implicit in the statement that the businesses were "ongoing and sucess-

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[16] C.A. Brief for Appellant, p. 27. The jury was instructed that to support a fraud claim, a representation "must relate to an ascertainable fact as distinguished from a mere matter of opinion, judgment, probability, or expectation." C.A. Record Excerpts for Appellants, p. 313. This proposition is supported by Texas law. *E.g., Zar v. Omni Industries,* 813 F.2d 689, 693 (5th Cir. 1987); *Jeffcoat* v. *Phillips,* 534 S.W.2d 168, 171 (Tex. Civ. App. 1976).

[17] The court immediately thereafter conceded that "a representation regarding the 'ongoing' nature of subsidiaries which a parent corporation is selling to the subsidiaries' officers [as was the case here] would not necessarily be false." App. 56a.

ful," which the jury did find. Only by its own review of the evidence does the court of appeals essentially conclude that the promises should have been in issue before the jury, and thus treat the verdict as embodying them.

Such a reading is especially unreasonable—and an affront not only to the jury process but to the authority of the district court—because the district court specifically considered and rejected a proposed special interrogatory that would have posed to the jury the core of the factual issue decided by the court of appeals—whether petitioner committed fraud in promising not to sell BI until the loan was paid off. App. 80a. Without acknowledging that it was doing so, the court of appeals thus overrode the trial judge's decision not to present the issue to the jury, and directed a verdict of fraud liability based upon that issue.

C. Damages Award

As to the award of damages under the fraud claim, the court of appeals usurped the jury's fact-finding function in an even more obvious way. It rejected in principle the theory on which the jury had been instructed, and enunciated a distinct theory, but did not remand for a new trial to allow the facts to be found under the new legal theory. Instead, the court of appeals remanded with instructions that the district court reduce the six million dollar judgment in certain specified respects. It did not utilize the process of remittitur, under which a conditional new trial order is entered. Instead it simply relied on judicial fiat to correct the district court's allegedly erroneous legal theory, and then directed that the district court enter a judgment for damages along lines which it prescribed, and contrary to the actual verdict of the jury.

The district court instructed the jury on two distinct measures of damages—an out-of-pocket loss measure ap-

plicable to respondent's fraud theory,[18] and a benefit-of-the-bargain measure applicable to respondent's theory of tortious interference with contract.[19] Neither party objected to those instructions. On the fraud claim, covered by the out-of-pocket measure, the jury found damages in the amount of $6 million. On the tortious interference with contract claim, covered by the benefit-of-the-bargain measure, the jury found zero damages.

On appeal, petitioner argued that respondent had failed to prove the value of the property received in exchange for the loan, *i.e.*, the guarantees from the individual company officers, and that the jury's finding of $6 million damages on the fraud claim therefore had no evidentiary basis. In response to this argument, the court of appeals rejected in principle the applicability of the out-of-pocket measure of damages. "[T]he straight loan of money without expectation of participating in the profits of the

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[18] As to the damages under the fraud theory, the court instructed:

> You are instructed that as to Gibraltar's claims of fraud, if you find that Gibraltar has suffered injury or damage as a proximate result of the alleged misrepresentations, Gibraltar is entitled to recover damages. The measure of common law fraud damages is the difference between the value of what Gibraltar parted with and the value of what it received on the date the loan was funded. You are instructed that fair market value means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.

[19] As to damages under the tortious interference theory, the court instructed:

> You are further instructed that the measure of damages for wrongful interference with contract is the amount of money you find that Gibraltar would have received under the contract in question had the wrongful interference no [sic] occurred, less any amounts received by GIBRALTAR in connection with this claim from persons or entities other than the defendants.

venture, as here, does not implicate the out-of-pocket limit on damages appropriate in actions under the securities laws." App. 62a.

The conclusion is inescapable that the court of appeals has completely rewritten the theory of damages applicable to the alleged fraud liability, and directed a verdict in accordance with the formula which the court of appeals itself has set out. It has used the jury's $6 million verdict, reached under a measure of damages that it held to be incorrect, simply as a handy starting point from which to begin its own fact-finding deliberations.[20] The court of appeals found it "quite apparent" that the jury had taken into account not only the $5 million note, but also the interest on that money through the time of trial. It then speculated that the jury had "apparently selected a rate" somewhat higher than the rate provided in the note, and concluded that "this error must be reformed by the district court." App. 63a-64a. The court then went on to direct further modifications in the

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[20] If the court's fact-finding as to damages also applies to the judgment pertaining to tortious interference with contract, its action in that respect was even more freewheeling. The court concluded that the jury's verdict of no damages was inconsistent with the jury's finding that tortious interference with contract had, in fact, occurred. If the court's damage analysis is applicable to the tortious interference claim, the court simply cast aside the jury's finding of no damages and substituted its own contrary view that several million dollars in damages are appropriate—on the ground that the jury "evidently" intended to avoid a double recovery. At no time did the court consider whether there might be other explanations for the jury's verdict under the benefit-of-the-bargain measure of damages—such as its valuation in set-off of "any amounts received by Gibraltar in connection with this claim," in accordance with the tortious interference (but not the fraud) damage instruction. *See* notes 18, 19, *supra*. The court neither acknowledged nor followed the principle that it may find facts contrary to those found by the jury only if, as a matter of law, the facts it finds are the only findings that a reasonable jury could reach.

district court judgment to reflect sums actually received in settlements with guarantors and through other ongoing litigation. Under the jury instructions as given, these set-offs were to be considered in calculating damages under the tortious interference theory, but not under the fraud theory.

The court of appeals has no proper power to find facts or to direct a verdict for the plaintiff on the issues of liability and damages. "[A] bald addition of something which in no sense can be said to be included in the verdict is violative of the Seventh Amendment." *United Air Lines v. Wiener*, 335 F.2d 379, 407 (9th Cir. 1964). In affirming the judgment of liability on the fraud theory—based on statements never found by the jury—and in directing entry of a damage award radically different from that returned by the jury—indeed under a wholly different theory of damages—the court of appeals has far exceeded its authority and undermined the basic right of trial by jury.

III. THE ISSUE PRESENTED OF THE POWER OF COURTS OF APPEALS TO SUPPLEMENT OR OVERRIDE JURY FACT-FINDING MERITS THIS COURT'S ATTENTION

The court below has invaded the province of the jury by directing the entry of judgment for the plaintiff based on its own fact-finding on the issues of liability and damages. It effectively directed a verdict of fraud liability resting on representations that the jury has never been asked to consider, and as to which there was substantial evidence to support the petitioner. It did this without acknowledging that it was doing so, and without any attempt to show that such action was justified under the applicable legal standard. This petition presents no issue of the sufficiency of the evidence to uphold a jury's verdict, or to justify entry or denial of a directed verdict or a judgment notwithstanding the verdict.

Because the role of the appellate courts in reviewing jury verdicts is frequently recurring, and because of the failure of the court below to recognize the extraordinary nature of its action, certiorari should be granted. We submit that the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). The error here is a fundamental one, and if left uncorrected, it will likely serve to justify future episodic violations of the right to trial by jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LDB CORPORATION,

Petitioner,

v.

GIBRALTAR SAVINGS,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

Amended Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5569

GIBRALTAR SAVINGS,
Plaintiff-Appellee
Cross-Appellant,

versus

LDBRINKMAN CORPORATION,
Defendant-Appellant
Cross-Appellee,

and

LLOYD D. BRINKMAN,
Defendant-Cross-Appellee.

Appeals from the United States District Court
for the Western District of Texas

December 2, 1988
(As *Amended* December 30, 1988)

A.B. Conant, Jr., Ivan Irwin, Jr., David M. Pruessner, Mark R. Randall, Shank, Irwin, Conant, Lipshy and Casterline, Dallas, Tex., John N. McCamish, Jr., Jonathan D. Pauerstein, J. Patrick Deely, McCamish, Ingram,

Martin and Brown, San Antonio, Tex., for defendant-appellant cross-appellee.

Bernard William Fischman, Houston, Tex., Franklin D. Houser, San Antonio, Tex., for plaintiff-appellee cross-appellant.

Before GEE, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This appeal challenges $6,000,000 plus interest and attorneys' fees awarded upon jury findings that officers of a holding company fraudulently induced a $5 million loan to a subsidiary and that they thereafter "looted" the named borrower's assets and thus tortiously interfered with its contractual obligations to the lender. The district court also granted judgment notwithstanding the verdict with regard to claims that the individual owner and the holding company were the "alter egos" of the borrower and its guarantors. We affirm in part, reverse in part, and remand for a redetermination of damages.

I. *Overview.*

Gibraltar Savings $5 million note was defaulted upon by the named borrower, a real estate development corporation, subsidiaries of which participated in multiple limited partnerships. The lender sued the borrower, its director-guarantors, and the borrower's corporate parent (also a guarantor) and its parent corporation (a holding company) and its individual owner. The borrower, its corporate parent, and other related enterprises are now insolvent. The individual director-guarantors have settled with Gibraltar.[1] This case was tried solely against the last links in the chain: entrepreneur Lloyd D. Brinkman and his principal holding company, LDBrinkman

[1] The borrower's president and chairman, Ben D. Woody, has settled his personal guaranty on the note for $350,000. Delbert G. McDougal, the other general partner in these real estate development joint ventures, who also guaranteed Gibraltar's $5 million loan, has settled as well with the lender for $350,000.

Corp. The entity to which Gibraltar made the loan was a real estate development subsidiary of a mobile home manufacturer wholly owned by LDBrinkman Corp., which also was the parent company of most of Brinkman's other ventures.[2]

The jury awarded Gibraltar Savings $6 million against the defendants as the borrower's (and its parent-guarantor's) "alter ego," and for both fraud and tortious interference with the borrower's contractual relationships with regard to the loan Gibraltar negotiated for it through the holding company. The trial court granted, in part, the defendants' motion for judgment notwithstanding the verdict, finding the "alter ego" theory unsupported by the evidence; this ruling left no basis of liability against Brinkman personally, and he does not appeal.

However, the verdict on the fraud charge, attacked by LDBrinkman Corp. as clearly erroneous, unproven for failure to establish reliance, and based upon nonactionable opinion statements, was left standing; the district court entered, against the holding company, judgment thereon and upon a finding of tortious interference with contractual relations. The defendants' counterclaim for usury was rejected. The court awarded $332,500 attorneys' fees under a Texas statute allowing such fee-shifting in contractual recoveries; that award

---

[2] LDBrinkman Corp. acted as Brinkman's holding company for: a chain of pizzarias; LDBrinkman Co., a very large floor-covering distributor with sizeable business debt; a company called Commercial Aviation, which also had obtained over $3,000,000 in loans; and Brinkcraft, Inc. (BI), a recently-acquired mobile home manufacturer, which was the sole owner of the entity to which Gibraltar extended its loan. Brinkman allowed the former BI owner Ben D. Woody—retained as president and chairman, but without any ownership interest—to branch it and later-organized subsidiaries into real estate development limited partnerships and other fields utilizing BI's prefabricated structures, LDBrinkman Co.'s floor coverings, and the like.

of attorneys' fees is also challenged by LDBrinkman Corp. on appeal. Gibraltar's cross-appeal against both LDBrinkman Corp. and Brinkman seeks to reinstate the jury's finding of "alter ego" liability.

II. *Brinkcraft Development, Inc.*

Lloyd D. Brinkman now presides over very little of a once-solvent and far-extended Texas business empire that reached throughout the Middle South and Southwest and that once had annual revenues of over a quarter-billion dollars. In addition to a series of unrelated business and financial ventures, Brinkman moved a rather minor floor-covering company into industry prominence, extended it horizontally by the purchase of a manufactured-housing concern, and eventually established a development company to utilize his other businesses' supplies. This corporation, in turn, expanded into property management and limited partnerships for further real estate development. When the oil-backed economy of the Southwest went sour, the bottom fell out of Brinkman's realty ventures.

Ignoring the earliest beginnings of Brinkman's ever-increasing commercial endeavors, the history of the development subsidiaries begins with his buy-out of a modular construction company operated as a sole proprietorship. Ben D. Woody nurtured his mobile home and manufactured-housing business for several years with considerable success. Brinkman acquired all of Woody's stock in the company in 1978, retaining Woody as president and chairman. In order to identify the manufactured-housing business more closely with his other concerns and thus to strengthen the financial appearance of his fledgling empire, Brinkman renamed the company Brinkcraft, Inc. (BI), and placed it under his holding company, LDBrinkman Corp.

In 1982, BI for the first time ventured into real estate development through a series of limited partnerships.

These ventures typically had BI and one Delbert G. McDougal as general partners with, respectively, 50 percent and 25 percent ownership, and Woody as limited partner with the remaining 25 percent ownership. These limited partnerships were managed by McDougal and operated by Brinkcraft Development Co. (BDC), which was wholly-owned by the BI subsidiary established to engage in various development ventures: Brinkcraft Development, Inc. (BDI), which was created to develop properties largely through placement of modular units purchased from BI. Brinkman's corporate structure for real estate projects thus was:

Lloyd D. Brinkman

LDBRINKMAN CORP.
(Kerrville-based holding company)

LDBRINKMAN CO. (floor covering) | BRINKCRAFT, INC. (BI) (Wichita Falls manufactured housing concern under Woody) | OTHER COMPANIES

BRINKCRAFT DEVELOPMENT, INC. (BDI)
(Lubbock-based modular construction company under McDougal)

BRINKCRAFT DEVELOPMENT CO. (BDC)

PROPERTY MANAGEMENT | LIMITED PARTNERSHIPS (BI—50% owner/gen. p.; McDougal—25% owner/gen. p.; and Woody—25% owner/limited partner) | OTHER PROJECTS

Gibraltar's $5 million loan to BDI (guaranteed by BI, Woody, and McDougal), which occasioned this suit, was intended to fund existing and planned joint ventures by BDC. Though the holding company had no direct relation with BDI or BDC, McDougal was required to obtain LDBrinkman Corp.'s approval (through the holding company's chief financial officer) before commencing any BDC development projects. In large part, Woody's control of BI was similarly circumscribed, though none of

LDBrinkman Corp.'s officers occupied any positions at BI, BDI, or BDC.

III. *A Roster of the Remaining Players.*

Ray Hufhines was BI's comptroller and chief financial officer, but testified that he took his orders principally from the holding company's finance personnel. Herb Bradshaw, senior vice president of LDBrinkman Corp., was hired some months before the default on the Gibraltar loan and was one of the prime movers in divesting the holding company of the Brinkcraft's subsidiaries (see *infra* note 47); Gibraltar, indeed, offered proof that he was brought into the company with the thought that he would sell off or otherwise pare back the holding company's marginal operating subsidiaries. Don Bullock was the holding company's treasurer, and Thomas Ratcliffe was its chief financial officer; together they ran most of Brinkman's business operations on a daily basis and were responsible for all but the most important fiscal decisions. Ratcliffe had obtained some $2.5 million for BDI from BancTexas, Dallas (BancTexas), which Brinkman served as a director. (BancTexas had extended to Brinkman sizeable personal and corporate loans and was threatening to call some of these loans during the period in question.)

Ratcliffe desired to have the BancTexas $2.5 million retired through the Gibraltar loan of $5 million; while this was disclosed to the lender, Gibraltar now alleges that other, equally-important, business rationales (of LD Brinkman Corp. and Brinkman, not of the development companies) were undisclosed. CFO Ratcliffe allegedly had enormous input into BDC investment choices and general decisionmaking, and—quite obviously—was involved in the daily operations of both BDI and BDC. (Ratcliffe terminated his employment with LDBrinkman Corp. when the Gibraltar loan went bad, but escaped with a lucrative "consulting" golden parachute.)

Thad Finley, LDBrinkman Corp.'s in-house counsel, sat on the boards of, or was an officer of, most of Brinkman's businesses. His connection with the instant loan will be explored below. Brinkman's longtime friend Ivan Irwin, Jr., acted as the holding company's outside general counsel and also, apparently, actively advised on business decisions. He sat on BI's board and served Brinkman as particular matters required. Homer Kirby, a lawyer and self-styled workout specialist, is associated with outside counsel Irwin's law partners and was the person to whom LDBrinkman Corp. transfered BI's stock; Gibraltar accuses him of plundering the subsidiary's remaining assets before he filed BI's bankruptcy.

Frederic Farlow was a long-time friend of, and financier for, Lloyd D. Brinkman; through Farlow, Brinkman, personally and for his various ventures, had obtained some $5-6,000,000 credit from Farlow's previous employers. Gibraltar Savings' chief loan executive, James Hollingsworth, hired Farlow as a Gibraltar loan production officer, and thereafter approved Farlow's (sometimes ambitious) loan recommendations, including the one in question. A self-described "money peddler," Farlow was an extremely aggressive and eager promoter of both himself and deals he wished to see consummated.

While both Hollingsworth and Farlow were with Lloyds Bank (the former in California, the latter in Houston), Hollingsworth supervised some of Farlow's lending activities; Brinkman had obtained two Lloyds Bank loans through Farlow during this period, but Hollingsworth had no contact with these transactions. When Lloyds Bank closed its Houston office, it was natural for Farlow to offer his services to Gibraltar's new Texas corporate finance head, for whom he had previously worked. It is disputed whether Hollingsworth was, or needed to be, apprised of Farlow's personal relationship with Brinkman and Ratcliffe, though he clearly knew that their business contact was extremely friendly, that Farlow sought to service his clients to the benefit of all

parties and that Farlow might embellish the merits of a loan he negotiated.

IV. *What Farlow Was Told During the Loan Negotiations.*

Through Farlow, Ratcliffe sought and obtained a $5 million loan for BDI from Gibraltar. Little else is clear and undisputed. Not only particular acts, statements, or omissions are controverted, but the entire tone of the negotiations could not be more diametrically characterized: In Gibraltar's view, their new employee acted as virtual agent for Brinkman and LDBrinkman Corp.'s officers, who duped him into a misplaced trust and generally took advantage of their past friendship and amicable business relations and his current desire to consummate several loan deals; according to the defendants, Farlow was an aggressive promoter who went to all lengths to sell them on the loan and whose lax investigation and careless (reckless) lending zeal came back to haunt his new employer.

From the verdict, it is clear that the jury was largely persuaded by Gibraltar's case; the lender's evidence was elaborate and far-ranging, and we will not attempt to summarize all of it here. Additional facts that do not clearly fit into the overall puzzle will be described where appropriate. It is fair to say from the evidence, however, that the initial contact came from LDBrinkman Corp.

Whether an informal mention of possible financing from Gibraltar had previously occurred, it is certain that LDBrinkman Corp.'s CFO, Ratcliffe, raised the topic of a new loan with Farlow in August 1984. At this time, Farlow negotiated the transfer of some $4 million of Lloyds loans owed by Brinkman or his companies to Gibraltar; this refinancing was completed before the present negotiations began, and those sums were either repaid when due or were kept current by their respective borrowers. Farlow had also submitted to Lloyds a proposed

unsecured loan to finance development of new real estate projects; when Farlow was unable to convince his then employer to accept the deal, Ratcliffe turned to Banc Texas. It is this prior similar proposal upon which LD Brinkman Corp. bases its contention that Farlow knew of the need for financing for BDC projects, and that thus it was he who initiated the transaction.

During the discussions concerning his loan request for BDI, Ratcliffe was the sole representative, though he held no position with the ostensible borrower—even as, for a time, one of its four directors, he had not been denominated treasurer or secretary. Neither Woody nor McDougal—nor, indeed, any officer of BI or BDI—took any part in negotiating the Gibraltar loan, and both later guarantors maintain that they knew nothing of Ratcliffe's refinancing plan until presented with the completed loan documents for their signatures. BI's and BDI's comptroller also testified that he know nothing of the Gibraltar loan until after the fact. To reinforce, in the lending officers' minds, that the holding company was the real party in interest, the sole correspondence regarding the loan was on LDBrinkman Corp. stationery.

During August and September 1984, Ratcliffe and Farlow negotiated telephonically and in person, and, per Farlow's later testimony, Ratcliffe made, *inter alia*, the following representations, which Farlow first passed onto chief Gibraltar loan officer Hollingsworth and, in turn, to Gibraltar's entire loan committee:

1. BI's intercompany debt to LDBrinkman Corp. was $7 million, and BDI's "outside debt" was solely $2.5 million owed to BancTexas; [3]

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[3] Ratcliffe had negotiated the line of credit with BancTexas—which Brinkman served by sitting on its board of directors. That debt was due, and the lender was unwilling to roll it over, though LDBrinkman Corp.'s owner and officers sought such a direct refinancing and attempted to persuade BancTexas that the subsidiary would remain solvent—despite their alleged knowledge that BDI

2. The Gibraltar $5 million would be used exclusively to repay BDI's BancTexas debt, with the balance as operating capital to finish BDC's real estate development projects;

3. LDBrinkman Corp. would subordinate its $7 million in unsecured advances to BI, until the Gibraltar loan was repaid;

4. LDBrinkman Corp. would impose a moratorium on dividend payments from BI to LDBrinkman Corp.; and

5. LDBrinkman Corp. would maintain both BI and BDI as "going concerns" until the Gibraltar loan was repaid.

Based upon Farlow's repetition of these statements to Hollingsworth and upon the financial information gleaned from LDBrinkman Corp.'s and BI's annual reports, a Gibraltar credit analyst prepared a "credit request." This in-house credit request was never circulated to the borrower or those acting for it, but was placed before the bank's executives; they considered that analysis, a spread-sheet compiled from financial statements and annual reports, along with further financial data. Included in this package were documents provided by Farlow; submitted previously with respect to the Lloyd's refinancing showing BDI with almost $4 million in assets and the individual guarantors with more than $4 million combined worth, of which almost $1 million was liquid.

At the time, Woody and McDougal were thought to be taking a one-half interest in BDI but had not been consulted on their willingness to guarantee the contemplated loan. (Woody testified that he resisted the stock transfer

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could not meet such an amount in the short term of any contemplated refinancing, and also despite their conclusion that the business's future was questionable. Brinkman admitted he would not have "felt right" about leaving BDI's debt to BancTexas unpaid, so Farlow was contacted to obtain a Gibraltar loan to eliminate the BancTexas debt.

and told Ratcliffe on September 6, 1984, that he "didn't want to own a corporation owing $5 million [but] with no assets." Despite pressure placed on Woody by Brinkman, Ratcliffe, and Finley, the transfer never took place.) No guaranty was sought from LDBrinkman Corp. or Brinkman. Because Ratcliffe was not an officer or director of BDI or BI at the time, LDBrinkman Corp.'s in-house counsel Finley prepared a special corporate resolution for Ratcliffe's signature authorizing him to sign BI's guaranty of the BDI note.[4]

The loan documents originally were prepared for BDC, but this was changed to BDI. The lender knew that no financial statements were available for either BDI or BDC, and that BDI was a "shell" without independent assets. (Its corporate checking account seldom had a continuing balance of over $100.) Gibraltar's loan committee approved the deal during the first week of September. On September 5, Farlow visited LDBrinkman Corp. headquarters in Kerrville to present the loan documents for Lubbock-based BDI. When Farlow again went to Kerrville for the closing on September 14, still no BI or BDI representatives were present. On September 26, the loan proceeds were wired not to BDI in Lubbock, but to BI's account at its offices in Wichita Falls. Under Ratcliffe's direct instructions to BI's comptroller, the loan proceeds were distributed by bank wire as follows: (1)

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[4] Contrary to the facts recited in that resolution, no board meeting was held, and in the rush of later events, Finley, Ratcliffe, and Brinkman—allegedly "realizing their error"—attempted to "cover its [LDBrinkman Corp.'s] tracks" by creating a conveniently-backdated "unanimous consent" for BI's directors to sign. Woody protested the date recited in the resolution, refused to participate in the effort to formalize and authorize the prior actions of Ratcliffe, and thus made it clear that his and BI's approval was not sought until long after the fact. At the same time, Finley prepared another unanimous consent for the directors' signatures reciting BI's board's unanimous consent to the Woody-McDougal buy-back of BDI.

$2,525,000 to BancTexas; (2) $475,000 on BDI's account to satisfy BDI's line of credit (guaranteed by BI, Woody, and McDougal) from its Lubbock bank; and (3) $2 million to LDBrinkman Corp. in Dallas.

During the loan negotiations, Ratcliff failed to mention BDI's additional "outside" debt of almost $1 million, LDBrinkman Corp.'s intention to use proceeds from the Gibraltar loan to retire part of the debt owed BDI's Lubbock bank, or the possibility of LDBrinkman Corp.'s diverting $2 million to repay part of LDBrinkman Corp.'s advances to BDI. Ratcliffe admitted that he saw BDI "as just a subsidiary that was used to make the loan," and so he perceived no impropriety in dividing the moneys received as most benficial to the holding company, regardless of the prior representation that the Gibraltar loan would be used exclusively to retire the BancTexas debt and then to supply BDI and BDC with working capital for their real estate projects.

Ratcliffe also concealed LDBrinkman Corp.'s contemporaneous plan to dispose of the Brinkcraft subsidiaries and to treat them as "discontinued operations" from as early as the spring of 1984, months before the Gibraltar loan was negotiated. Ratcliffe and Brinkman both testified that the decision to discontinue BI and BDI was not made until November or December 1984,[5] but considerable evidence to the contrary was adduced at trial.

V. *The Default.*

Gibraltar contends that LDBrinkman Corp.'s diversion of the loan proceeds was but the first link in a chain of acts designed to strip BI of its cash and other readily-

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[5] Brinkman stated that LDBrinkman Corp.'s board of directors made such a year-end decision to discontinue the Brinkcraft subsidiaries, but no corporate minutes were prepared to document this significant decision affecting an important component of LDBrinkman Corp.'s business.

saleable assets, thus shifting a good part of Brinkman's loss on the Brinkcraft subsidiaries to their outside creditors. In total, between the time Gibraltar's loan (September 26, 1984) and the point at which LDBrinkman Corp. formally wrote the subsidiaries off its books (April 1985), LDBrinkman Corp. took a total of $3.067 million directly from BI in cash and assets, and, additionally, $1.3 million directly from the real estate development partnerships controlled by BDC.[6]

The intercompany advances from LDBrinkman Corp. to BI, which were thus recovered by LDBrinkman Corp., were not evidenced for the most part by promissory notes or other documentation. BI in general, and the development projects in particular, were always undercapitalized, and it was the holding company's advances that kept the subsidiaries "afloat."

Woody testified that if BI needed money for a project, "we would call the Kerrville office and they would advance money to us." Similar *ad hoc* financing occurred for BDI and BDC. When orders would come to send money back to the parent, BI and BDI obeyed, even if such instructions were contrary to the lines of communication LDBrinkman Corp. itself had established for the movement of "excess funds." Such transfers were not formally-declared dividends, but were simply intercompany advances flowing in the opposite direction.[7]

---

[6] The $1.3 million figure represented the proceeds from the profitable sales of two of the development projects. In both instances, McDougal testified that he had intended to use those funds to reduce the Gibraltar obligation, but was prevented, under the threat of losing his job, from doing so by express orders (from Brinkman and Ratcliffe on the Sagewood sale and from Herb Bradshaw on the undeveloped Albuquerque land), to send the proceeds directly to the parent company.

[7] While characterizing Brinkman's machinations as a "shell game" is inappropriate, it is clear from Woody's testimony that the ostensibly separate entities were entirely controlled by LDBrinkman

In December 1984, Ratcliffe transmitted BI's financial statement to Republic National Bank, Dallas, without mention of the $5 million Gibraltar loan to BI's subsidiary BDI, but excused that violation of accepted accounting procedures later, "because that debt was in Brinkcraft Development and it was a voting control of Brinkcraft Development and was only temporary. And accounting rules say you do not consolidate that subsidiary." [8]

This was directly opposite to the prior practice of the holding company and BI with regard to reporting subsidiaries' finances. While BDI was reported on a "consolidated basis" with BI because it was 100-percent owned by BI, and while similarly wholly-owned BI had previously been consolidated in LDBrinkman Corp.'s financial reporting, Ratcliffe decided to remove BDI from BI's statement, thus concealing the $5 million debt in BI's fiscal report.

BI's comptroller testified that he protested that this financial statement would be false and misleading, even if BI's "control" of BDI was, indeed, only "temporary";

Corp. and Ratcliffe and Brinkman. If Brinkman wanted a BDI project discontinued, it was discontinued, without regard to the losses which BI would incur. Brinkman once demanded that BI surrender an aircraft on loan from Commercial Aviation, and though BI complied, it thereafter had to lease one from an unrelated company. Brinkman similarly demanded that BI sell off its division known as Woodco Supply in a partial liquidation of assets, and it was done. When the LDBrinkman Corp. decided to change BI's name back to one similar to what Woody had used before the buyout, Woody, although president of the company and a member of its board of directors, was not consulted and took no part in the action. When LDBrinkman Corp. demanded that $1 million from the proceeds of a large Albuquerque sale be deposited directly with the parent company, the subsidiary complied. Though having no common officers and only a few overlapping directors, Wichita Falls-based BI had its corporate minutes prepared and kept at LDBrinkman Corp. headquarters in Kerrville.

[8] LDBrinkman Corp.'s own experts testified that Ratcliffe had no acceptable basis for this "bizarre" interpretation of proper accounting rules.

though 50 percent of the stock was supposed to have been transferred to Woody and McDougal on September 6, 1984 (the day after Farlow visited LDBrinkman Corp. headquarters in Kerrville to present the loan documents for Lubbock-based BDI), this buy-back had fallen through almost four months before Ratcliffe made his questionable accounting decision.

On June 1, 1985, Ratcliffe terminated his employment with LDBrinkman Corp. and went on a three-year, $130,000 annual "consulting contract." At a June 10 meeting, LDBrinkman Corp.'s senior vice president Herb Bradshaw and Gibraltar's representatives—Hollingsworth and Farlow—met in Houston to discuss "a problem" with the loan. LDBrinkman Corp. also had present in-house counsel Finley, outside general counsel Ivan Irwin, and treasurer Don Bullock, as well as Woody and McDougal representing the Brinkcraft subsidiaries.

At this meeting, the holding company officers disclosed for the first time (1) that a portion of the loan proceeds had been applied in a manner at variance with what Ratcliffe (now departed) had promised Farlow; (2) Ratcliffe had instructed BI's comptroller to "delete" the Gibraltar loan from BI's financial statements; (3) that neither BI nor BDI had any capacity to repay the loan; and (4) that LDBrinkman Corp. had no intention of continuing its prior financial support for the Brinkcraft subsidiaries, which would allow continued debt service by DEI or BI. Hollingsworth thereupon called the loan under the demand provision of the note.

Negotiations between Gibraltar and the borrower's guarantors continued, despite the lender's demand and despite BI's rapidly-accelerating decline. When a $5.5 million judgment against BI was awarded a construction company for defects in the modular units BI supplied for a Port Aransas condominium complex, patience with, and confidence in, the parent-guarantor evaporated. Nonetheless, the lender was repeatedly reassured that

more time might see the subsidiary's loan made good from the sale of other development projects. This was the period, however, during which almost $4.4 million in BI assets was applied by the holding company to repay a majority of LDBrinkman Corp.'s $7 million in past advances to BI.

In September 1985, on advice of its counsel, LDBrinkman Corp. instructed BI not to pay principal or accrued interest on the Gibraltar loan. Prior to that date, LD Brinkman Corp. had funded the interest payments, and in at least one instance made the payment directly. In October 1985, after first changing the name back to something similar to what BI had been called when Woody had owned it, LDBrinkman Corp. transferred all of BI's stock to "Dallas businessman" Homer Kirby, a self-styled "work out" expert.

Kirby, who is a lawyer associated with one of LD Brinkman Corp. outside counsel Irwin's law partners, gave no money, notes, or other consideration for the stock. In his attempts to "salvage LDBrinkman from financial ruin," Kirby conferred upon himself a $7500 monthly salary, and, on one occasion, a $30,000 real estate commission for disposing of some of BI's property. Kirby filed Chapter 11 proceedings for the company after Gibraltar filed suit in November 1985.

VI. *The Suit.*

The loan was never repaid, and interest accrued to trial to the tune of $787,226. Gibraltar [9] sued the contractual parties, BI's successor under Kirby, and individual guarantors McDougal and Woody, as well as LD-Brinkman Corp. and Lloyd Brinkman. To avoid forc-

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[9] The plaintiff here is a California corporation that is unaffiliated with the Texas institution of the same name, and so jurisdiction below was based upon diversity, as well as upon federal questions raised by statutory claims Gibraltar pled.

ing Woody and McDougal into personal bankruptcy, and in return for their cooperation, Gibraltar settled their individual liabilities under their guaranties for $1,000,000 and an assignment of their interests in the partnerships. Subsequent to dismissal of claims against them individually, the settlement sum was negotiated down to $350,000 each, once the assigned joint ventures met certain agreed-upon financial goals. Once Kirby petitioned for Chapter 11 relief, Gibraltar obtained from the bankruptcy court an agreed judgment of $5 million and $5000 attorneys' fees.

The only defendants remaining here are Lloyd D. Brinkman and LDBrinkman Corp. While the original and amended complaints listed other parties, Gibraltar's third amended complaint alleged that LDBrinkman Corp. and Brinkman were liable as the Brinkcraft subsidiaries' "alter egos" and for RICO [10] violations, common-law fraud, and tortious interference with contractual relations. This final amendment also removed an interest claim against LDBrinkman Corp. that would have supported a charge of usury by Gibraltar under Texas law and on the basis of which the defendants counterclaimed.

The jury found two of Ratcliffe's statements to have fraudulently induced the loan to BDI. Awarding no separate damages, the jury also found LDBrinkman Corp. to have tortiously interfered with the contractual obligations of BDI to the lender. The jury made four further findings that BI was the "alter ego" of BDI, that LD Brinkman Corp. was the "alter ego" of both BDI and BI, and that the holding company was, in turn, the "alter ego" of Brinkman. Gibraltar's other claims were rejected. The verdict was $6 million.

On motions for judgment notwithstanding the verdict, the trial judge disregarded the "alter ego" finding as

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[10] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*

unsupported by the evidence because, (1) with respect to Brinkman, LDBrinkman Corp. has not been shown to be incapable of meeting any judgment against it, and (2) with respect to LDBrinkman Corp., use of BI and BDI as "shells" did not necessitate "alter ego" liability, since there was liability for Ratcliffe's fraudulent representations. We affirm the judgment notwithstanding the verdict, but upon slightly different grounds.

VII. *Disregarding BDI and BI's Corporate Evidence.*

A. Standing To Bring the "Alter Ego" Claim?

As LDBrinkman Corp. states, "The reasons for Gibraltar's alter ego accusations are transparent": Brinkman and LDBrinkman Corp. are the only solvent parties. Given the fact that the named borrower is in bankruptcy, the question, then, is how it happened that this litigation was not tried by a bankruptcy court. While the claims which Gibraltar raises are precisely those expected to be raised by the bankruptcy trustee, and while the district court ordered additional claims to be deleted by amendment of the complaint under the view that fraudulent transfer claims were properly of the debtor's estate, we cannot agree with the defendants that Gibraltar's avoidance of the bankruptcy proceeding was improper with respect to the causes of action the district court allowed to go forward.

Brinkman and LDBrinkman Corp. first contend that the lender lacks standing to bring "alter ego" claims because we have previously held that a bankrupt's creditor cannot bring an "alter ego" claim against third parties in order to avoid the bankruptcy proceeding. The defendants' argument, in short, is that the United States District Court for the Western District of Texas lacked jurisdiction to hear the "alter ego" claims concerning businesses on the bankruptcy docket of the Northern Dis-

trict of Texas.[11] Prior precedent indeed has prohibited claims—such as Gibraltar's—apart from a subsidiary's ongoing bankruptcy, but we find the present situation distinguishable.

The theory denying Gibraltar standing on this issue is that "alter ego" liability against the parent company or owners, if appropriate at all, should be pursued by BDI's and BI's bankruptcy trustees for the benefit of all creditors, not just one whose claim is large enough, or its cause great enough, to allow it to assail the alleged "alter egos" in other fora. We have held on several occasions that such "alter ego" claims are the "property of the estate" within the meaning of the Bankruptcy Code. *See S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc.*, 817 F.2d 1142 (5th Cir.1987).[12]

S.I. Acquisition would preclude Gibraltar's asserting the "alter ego" claims, but for key distinguishing factors. First, Gibraltar sought and obtained leave, over LD Brinkman Corp.'s vigorous objection, in both the bankruptcy proceedings and the court below, to prosecute the third amended complaint, thereby satisfying the notice requirement expressed in *S.I. Acquisition.* 817 F.2d at 1154 n. 13. *See also In re River Hills Apts. Fund, Inc.*, 813 F.2d 702 (5th Cir.1987). In addition to the initial hearing on whether the case could proceed, the standing issue was unsuccessfully asserted on several occasions at trial, including in the defendants' motion for a directed verdict. These rulings go unappealed.

Second, though they appealed the order lifting the bankruptcy stay. LDBrinkman Corp. voluntarily dis-

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[11] *In re Lanchart, Inc. d/b/a Lancer Homes, f/d/b/a Brinkcraft, Inc.*, No. 7-85-70218 (N.D. Tex. filed Nov. 25, 1985) (the BI bankruptcy proceedings).

[12] *See also In re MortgageAmerica*, 714 F.2d 1266 (5th Cir. 1983); *Chicago Florsheim Shoe Store Co. v. Cluett, Peabody & Co.*, 826 F.2d 725 (7th Cir. 1987).

missed its appeal (under the erroneous assumption that the issue was moot).[13] Normally, we would review an order pursuant to 11 U.S.C. § 362(d) lifting an automatic stay under an abuse-of-discretion standard, but we decline to engage in this inquiry because the issue is not properly before us.[14] Nothing in *S.I. Acquisition* requires an independent evaluation of even potentially meritorious arguments; the power to lift the stay was properly exercised by the bankruptcy judge, and the propriety of that order on the instant facts is not now in question.

A third distinguishing factor also defeats the defendants' reliance upon the bankruptcy cases: Here it is the alleged "alter ego" entity itself that challenges the creditor-plaintiff's attempt to penetrate the corporate veil. In *S.I. Acquisition*, the bankruptcy trustee sought to prohibit a creditor-plaintiff from pursuing its claim through the trustee's contempt power. Here, in contrast, the trustee's leave was obtained.

An extension of *S.I. Acquisition* in LDBrinkman Corp.'s favor would mean that allegedly liable "alter egos" could escape liability should the trustee for a "shell" corpora-

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[13] *LDBrinkman Corp. v. Gibraltar Savings (In re Lanchart, Inc.)*, No. 7-85-70218 (N.D.Tex. filed Nov. 25, 1985), *appeal docketed*, No. 87-1332 (5th Cir. May 6, 1987), *voluntarily dismissed* (5th Cir. Sept. 14, 1987).

[14] When the district court lifted the automatic stay of proceedings, the defendants argued that there was no authority to allow other proceedings to continue. At the time the stay was lifted, the bankrupt borrower and parent-guarantors were named parties to Gibraltar's action. There are multiple instances in which separate proceedings have been allowed to coincide against a debtor. The defendants cite no cases limiting the discretion of the bankruptcy court to lift a stay allowing a claim such as Gibraltar's to be tried elsewhere. Expressing no view as to whether the instant exercise of the power to lift the automatic stay was an abuse of discretion, we hold that the defendants cannot succeed on their standing argument, because they voluntarily dismissed their appeal from the district court's ruling that the bankruptcy judge could lift the stay on this suit.

tion which it (the alleged "alter ego") has thrown into bankruptcy simply choose not to prosecute a potentially meritorious "alter ego" claim. We decline to convert the recognized shield for the debtor's estate into a shield for potentially liable "alter egos"; should the bankruptcy trustee decline the gauntlet, the veil-piercing sword is available to trot claimants or contract creditors, should they choose to attack in the bancruptcy proceeding or, with the bankruptcy court's leave, in another forum.

B. Gibraltar's Legal Theory.

The liability which Gibraltar seeks to impose upon LDBrinkman Corp. and Brinkman is a direct contractual one, as their operation of BI and BDI as "alter egos" for the overall parent holding company and the owner made them, not the "shell" subsidiaries, the real parties to the transaction. While both Gibraltar and LDBrinkman Corp. would characterize the "alter ego" issue as merely a cause of action for a "sham to perpetrate a fraud," the contractual liability sought is not for LDBrinkman Corp.'s own acts, but as it stands in the shoes of its subsidiaries through which it chose to transact business. *See Valdes v. Leisure Resource Group, Inc.*, 810 F.2d 1345 (5th Cir.1987).

This classic "alter ego" theory is, as correctly perceived by the district court, unsupported by the evidence under the current statement of Texas law on "piercing the corporate veil." We find, as did the district court, that there was insufficient evidence of lack of separateness to justify a jury finding that LDBrinkman Corp. and Brinkman were the 'alter egos" of BI and BDI. We accordingly affirm the judgment notwithstanding the verdict granted by the district court on the defendants' "alter ego" liability.

The plaintiff cannot switch from one veil-piercing theory to another. As our discussion of Texas law will make clear, the lender's "sham to perpetrate a fraud"

ground for corporate disregard is distinct from the sole ground addressed by the parties below: classic "alter ego" based upon the absence of any legal or factual distinction between the challenged corporate entity and its corporate or individual owner. Gibraltar chose the "alter ego" ground and not the distinct "sham to perpetrate a fraud" ground; the potentially meritorious alternative basis for corporate disregard is foreclosed, even if its factual and legal requirements may have been subsumed under the arguments made. We made absolutely clear in *Valdes* that an "[a]ppellee may not change legal horses midway through this stream" in its pursuit of direct liability of owners of a corporation, the legal separateness of which is to be disregarded. 810 F.2d at 1353 n. 7.

C. The Texas Approach to the Problem of Corporate Disregard

1. *"Alter Ego."*

In summarizing state law on "corporate disregard," the Texas Supreme Court began its most recent analysis with a general remark, then listed specific grounds previously recognized by caselaw:

> We disregard the corporate fiction, even though formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. Specifically, we disregard the corporate fiction: (1) when the fiction is used as a means of perpetrating fraud; (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation; (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation; (4) where the corporate fiction is employed to achieve or perpetrate monopoly; (5) where

> the corporate fiction is used to circumvent a statute; and (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong.

Castleberry v. Branscum, 721 S.W.2d 270, 271-72 (Tex. 1986) (citation and footnotes omitted).[15] We recently explained our bewilderment at some of the nuances of the *Castleberry* opinion in *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1131 (5th Cir.1988):

> The *Castleberry* opinion is puzzling. It begins with a most general principle—'when the corporate form has been used as part of a basically unfair device to achieve an inequitable result'—then follows with a laundry list of seven relatively detailed rationales that intertwine and overlap, yet point in various directions. We think we can fairly discern, however, three distinct strands of corporate disregard under Texas law . . . ., each [with] a different application.

One strand is obviously a classic "alter ego" prong. The phrase "alter ego" is certainly common in legal thought,[16] but it is now a misstatement of Texas law to use "alter

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[15] In a footnote immediately following this passage, the Court added a seventh ground, which in practice is an indicator of the other grounds, but which we list here for completeness: (7) where the corporation is inadequately capitalized.

[16] Classic "alter ego" has often been (and still is) used as a generic term for corporate disregard or "veil-piercing," but the *Castleberry* opinion makes clear that "alter ego" is a particular kind of rationale for corporate disregard. *See Pan Eastern*, 855 F.2d at 1130-33; *Valdes v. Leisure Resource Group, Inc.*, 810 F.2d at 1354. The focus of "alter ego" proper is on the *legal* adequacy of the corporation's existence, the failure to maintain separate identities between corporate forms, and the relationship between the corporation and its controlling corporate or individual owners. *See United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 696 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014, 106 S.Ct. 1194, 89 L.Ed.2d 309 (1986); *Nelson v. Int'l Paint Co.*, 734 F.2d 1084, 1091-93 (5th Cir. 1984).

ego" as a generic description of "disregarding the corporate fiction." The parties never objected to this usage in the district court, however, and in fact used it in their appellate briefs.

The first clause of *Castleberry*'s "laundry list" misleadingly implies that Texas law excludes classic "alter ego," *i.e.*, " 'disregarding' the corporate existence when there really is no legal or formal separate existence because of complete domination by the owners, co-mingling of funds, flaws in corporate formalities, etc." *Pan Eastern*, 855 F.2d at 1131 n. 39. Yet, as the court made clear later in the *Castleberry* opinion, "alter ego" is one of the grounds of corporate disregard recognized in Texas—specifically, under ground number (2): "[A]lter ego is only one of the bases for disregarding the corporate fiction: 'where a corporation is organized and operated as a mere tool or business conduit of another corporation.' " 721 S.W.2d at 272 (quoting *Pacific Am. Gas. Co. v. Miller*, 76 S.W.2d 833, 851 (Tex.Civ.App.—Amarillo 1934, writ ref'd)).

Many wholly-owned subsidiaries and closely-held corporations are not factually distinct from their owners. Many are in fact controlled and operated in close concert with the interests of the owners, and do not have a distinct factual existence: separate employees, offices, or properties; consolidated financial reporting and tax returns; and the like. Such conduct is perfectly natural and proper and provides no basis for ignoring legal independence.[17]

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[17] *Compare Edwards Co. v. Monogram Indus., Inc.*, 730 F.2d 977 (5th Cir. 1984) (en banc) ("shell" subsidiary was formally distinct, and creditor was not misled; corporate disregard under Texas law was therefore improper) *with United States v. Jon-T Chemicals, Inc.*, 768 F.2d at 696 (laundry list of 12 factors for judging lack of separateness under then-current Texas law). In *Valdes*, we remarked that

> [a]lter ego status is tautological with actual control of the subservient entity. Unrestricted ownership of that entity pro-

The problem arises when such a corporation is not treated as *legally* distinct; when, in other words, the owners neglect to maintain the *formal* independence of the corporation as required by law. "Alter ego's rationale is: 'if the shareholders themselves disregard the separation of the corporate enterprise, the law will also disregard it so far as necessary to protect individual and corporate creditors.'" *Castleberry*, 721 S.W.2d at 272 (quoting Ballantine, *Corporations* § 123 at 294 (1946)). Under *Castleberry*,

> Alter ego applies when there is such a unity between corporation and individual [or parent corporation] that the separateness of the corporation has ceased and holding only the corporation liable would result in an injustice. It is shown from the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual [or parent] maintains over the corporation, and whether the corporation has been used for personal [or parental] purposes.

Id. (citations omitted).

Whether sounding in contract or tort, invoking "alter ego" against a corporation may result in a windfall for creditors or tort claimants. In theory, even if the corporation was adequately capitalized, and even if the claimant did not rely upon the financial backing of the corporation's owners, the claimant is still entitled to recover as a sort of private attorney general. "Alter ego," therefore, properly focuses upon the relationship between

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vides a logical backdrop for domination, although ownership alone will not support an alter ego finding.

810 F.2d at 1354 (citing *Gentry v. Credit Plan Corp.*, 528 S.W.2d 571, 573 (Tex. 1975)).

the corporation and its owners and not upon the relationship between the corporation and the claimant-creditor.

Castleberry states the rationale for "alter ego" liability purely in terms of reciprocal fairness, "but clearly the rule is also designed to give incentives to those using the corporate form to obey the state's laws fully by maintaining corporate formalities, and thus the legal separateness, of the corporation." *Pan Eastern*, 855 F.2d at 1132. Owners that fail to maintain full legal formalities cannot expect to enjoy the limited liability that flows from the corporate form. In addition to legal formalities, formal sufficiency includes adequate capital; thus *Castleberry*'s seventh reason in its laundry list of reasons for corporate disregard—inadequate capitalization—is closely related to "alter ego," although it also fits comfortably in the third strand of corporate disregard.

Of course, the different species of corporate disregard seldom occur in pure form, so "alter ego" usually will be accompanied by assertions of unfairness to the claimant. But our present purpose is to isolate analytically the strands of the doctrine, and there is nothing in the "alter ego" strand to suggest that anything more is required than the failure of the owners to maintain the corporation as a distinct legal entity.

2. *"Illegal Purpose."*

The second strand of corporate disregard relates to the use the corporate form as a technique for avoiding legal limitations upon natural persons or corporations. In *Pan Eastern*, we termed this the "illegal purpose" strand of corporate disregard:

> Looking at the *Castleberry* list, '(5) where the corporate fiction is used to circumvent a statute' and '(4) where the corporate fiction is employed to achieve or perpetrate monopoly' are directly within this strand, while others overlap somewhat or fit in-

> directly: '(6) where the corporate fiction is relied upon as a protection of crime or to justify wrong'; '(3) where the corporate fiction is resorted to as a means of evading an existing legal obligation.'

Id. As with "alter ego" proper, the focus is on the relationship between and among the corporation, its owners, and the laws of the state rather than on the relationship between the claimant and the corporation; and, again, a creditor's recovery may be a windfall, because the claim may be unrelated to the illegal purpose. Still, it makes sense to refuse to allow owners to limit liability with the corporate form—even from unrelated civil claims—when the corporation is an instrument of illegality.

"Illegal purpose" disregard differs from "alter ego," however, because it can be used even when all corporate legal formalities have been kept. There are few cases that illustrate this strand of corporate disregard in any pure form; in practice, the "illegal purpose" rationale is usually an alternative basis in an "alter ego" or "sham to perpetrate fraud" case.

3. *"Sham To Perpetrate a Fraud."*

The third strand traditionally goes under the name "sham to perpetrate fraud," *Pace Corp. v. Jackson*, 155 Tex. 179, 190, 284 S.W.2d 340, 351 (1955), or as *Castleberry* puts it, "(1) when the fiction is used as a means of perpetrating fraud." 721 S.W.2d at 271. Elements of this strand can be found "(3) where the corporate fiction is resorted to as a means of evading an existing legal obligation" and "(6) where the corporate fiction is relied upon as a protection of crime or to justify wrong."

> The variety of shams is infinite, but many fit this case's pattern: A closely held corporation owes un-

> wanted obligations, it siphons off corporate revenues, sells off much of the corporate assets, or does other acts to hinder the ongoing business and its ability to pay off its debts.

Id. at 275 (citations omitted). This strand includes, especially for tort claimants, but also for some contract creditors, the concept of inadequate capitalization as a basis for corporate disregard. For the first time, the focus of veil-piercing analysis is on some inequitable result for the *claimant*, because of abuses of the corporate form.

Castleberry is emphatic that this category allows a corporate disregard in a much broader range of cases than those strictly speaking of fraud; citing *Pacific Am. Gas.*, 76 S.W. at 849, the opinion utilizes the term "constructive" fraud, but its reasoning is much broader:

> The basis used here to disregard the corporate fiction, a sham to perpetrate a fraud, is separate from alter ego. It is sometimes confused with intentional fraud; however, '[n]either fraud nor an intent to defraud need be shown as a prerequisite to disregarding the corporate entity; it is sufficient if recognizing the separate corporate existence would bring about an inequitable result.'

Castleberry, 721 S.W.2d at 272-73 (citations omitted). The court emphasized that this standard for corporate disregard is whether honoring legal independence would result in "inequity" or "injustice"; the purpose "is to prevent use of the corporate entity as a cloak for fraud or illegality or to work an injustice, and that purpose should not be thwarted by adherence to any particular theory of liability." *Id.* at 273.

Castleberry specifically holds that the question of injustice or inequity is a question of fact for the jury. The category is further discussed in *Pan Eastern:*

> The only limitation on this broad strand of corporate disregard is that the focus is on injustice or unfairness *to the claimant caused by the corporation and its owners.* The unfairness must be something greater than the mere failure to recover a full measure of damages; for example, the running of the statute of limitations as to a tort victim who simply sued the wrong related entity is not enough. *See Lucas v. Texas Industries, Inc.*, 696 S.W.2d 372 (Tex.1984). In contract cases (or in any case based on deliberate acts), the inequity frequently comes from reasonable reliance on the financial backing of the owners. Without reliance, the contract claimant cannot avoid the risk of insolvency that it originally accepted as part of the bargain. *See, e.g., Bell Oil & Gas Co. v. Allied Chemical Corp.*, 431 S.W.2d 336 (Tex.1968); *Edwards Co. v. Monogram Industries*, 730 F.2d 977 (5th Cir.1984) (en banc).

855 F.2d at 1133 (emphasis in original).

D. Evidentiary Sufficiency for Corporate Disregard Here.

Though Gibraltar and LDBrinkman Corp. would amalgamate the "alter ego" and "sham to perpetrate a fraud" strands of corporate disregard,[18] the district court submitted to the jury only the former prong under Texas veil-piercing law. The jury instruction on the difficult question of corporate disregard is set forth in the footnote.[19]

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[18] Only Brinkman's brief clearly indicates that Gibraltar's contentions go not to an "alter ego" theory but to a "sham to perpetrate a fraud."

[19] The instruction reads as follows:

> Gibraltar also contends that Brinkcraft Development, Inc. and Brinkcraft, Inc. were the alter egos of LDBrinkman Corporation and that LDBrinkman Corporation is the alter ego of Lloyd Brinkman. The general rule is that corporations and

We are mindful that such a jury finding, limited thus to the sufficiency of the showing of a lack of separate corporate existence to justify classic "alter ego" liability, "is heavily fact-specific and, as such, is peculiarly within

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shareholders are separate and distinct and that the liability of one cannot be imposed on the other; however, the existence of a *corporate entity may be disregarded where it is proved* that the corporation was created *as a mere device or sham to accomplish some ulterior purpose or as a mere instrumentality or agent of another corporation* or individual owning all or most of its stock, *or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose.*

In order to pierce the corporate veil under the theory that a corporation is the *alter ego* of its shareholder, the Plaintiff, in this case *Gibraltar, must prove both*, one, that the *separateness* of the corporation and the shareholder *has ceased to exist and*, two, that *upholding the separate corporate existence, would, under the circumstances, sanction fraud or promote injustice.*

Where one is the *principal stockholder* of one or more corporations and personally conducts their business or manages their assets, he may *be found individually liable* for the corporate obligations *if it is proved that* he has consistently engaged in a course of conduct by which *he has ignored the existence of the corporate entity* or entities and has, in fact, *conducted business as an individual by exercising such paramount and personal control over the operations* of the corporation or corporations that their corporate existence has been disregarded and their business interests and his own personal interests cannot be reasonably separated.

You are further instructed that majority or total ownership of all the stock in a corporation or mere control by the shareholder of a corporation does not mean that the corporation is the alter ego of its shareholders. *Gibraltar must show by a preponderance of the evidence that the absence of separateness between the parent and the subsidiary is so complete and that the two are so intertwined that the subsidiary is nothing but a name or a conduit through which the parent conducts its own business.* There must be a showing that for all practical purposes the subsidiary existed in name only and that there was virtually total disregard by the parent of the subsidiary's separate existence.

You are further instructed that a subsidiary corporation may become the alter ego of its parent corporation when the

the province" of the factfinder. *United States v. Jon-T Chemicals, Inc.*, 768 F.2d at 694. While the court hears the same evidence, when a jury finds facts and makes conclusions within its province, those determinations must ordinarily be upheld. The trial judge concluded that the jury's verdict on "alter ego" liability was unsupported because Gibraltar "failed to present *any* evidence" that BDI was LDBrinkman Corp.'s "alter ego" and "failed to present *sufficient* evidence" that BI was. We review the district court's determination contrary to the jury finding with a significant preference for upholding the verdict. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc).

Although we set out both sides of key factual disputes, for the sake of brevity we recite the facts from a perspective favorable to Gibraltar, since the jury's findings in its favor must be upheld unless completely unreasonable. *Id.* at 374. Our power to review the "alter ego" verdict is thus limited; such a jury finding must be upheld unless, (1) as a matter of law, the theory was inapposite to the case, or (2) the factual conclusions

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parent corporation totally dominates and controls the subsidiary as its agent or business conduit.

You are instructed that the question of alter ego does not turn upon any one fact. In making this determination, you may consider whether the parent and subsidiary have common stock ownership. Parent and subsidiary have common business deposits. Parent and subsidiary file consolidated financial statements and tax returns. *Parent finances the subsidiary.* Parent causes the incorporation of the subsidiary. Subsidiary operates with grossly *inadequate capital. Parent pays the salaries and other expenses of the subsidiary.* Parent uses the subsidiary's property as its own. The *subsidiary does not observe the basic corporate formalities* such as keeping separate books and records and holding in [sic] shareholder and board meetings. A subsidiary does *not* become the alter ego of its parent *merely because of stock ownership, a duplication of some or all of the directors or officers, or an exercise of the control that stock ownership gives* to the stockholder. [Emphasis added.]

were such as no reasonable juror could reach. While the first is not the case, because Gibraltar's complaint alleged facts sufficient to implicate total lack of regard for the Brinkcraft subsidiaries' corporate independence, we agree with the district court's determination that LD Brinkman Corp.'s operation of BI and BDI was not proven to be such as would allow a reasonable factfinder (properly instructed) to impose "alter ego" liability.

The sufficiency of the evidence is governed by federal law in a diversity case. *Id.* at 368-70. We agree with the district court that the record evidence requires a conclusion that the Brinkcraft subsidiaries (1) had their own staff, payroll, accounting department, auditors and attorneys; (2) kept separate books and bank accounts; (3) filed a consolidated federal income tax return separate from the return filed by LDBrinkman Corp.; (4) were managed by separate boards of directors that had overlapping, but not identical, memberships with that of the holding company; and (5) were centrally managed by the officers of LDBrinkman Corp., but had their own officers.

There was some evidence indicating a laxity of corporate minutes and other documentation, but such is not unusual in small corporations; nor is business conducted by non-contemporary declarations of unanimous consent, and by "past-dated" resolutions or minutes, necessarily indicative of a lack of corporate legal and formal separateness.

Indeed, the fact that such measures were taken indicates that efforts were being made to observe corporate distinctions between parent and subsidiary.[20] We note

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[20] In order to authorize the Woody-McDougal buy-back of BDI, LDBrinkman Corp. in-house counsel Finley prepared yet another "Certificate of Corporate Resolutions" for BI's board—reciting the "unanimous" consent of BI's directors to the transfer of 50% of BDI's stock to the subsidiaries' management.

that at least some of the "past-dated" documents formalizing prior actions were taken well in advance of litigation (either the bankruptcy proceeding or this suit) and so were not all as Gibraltar would characterize them.

That LDBrinkman Corp.'s chief financial officer and in-house counsel provided services for the subsidiaries was neither unusual nor improper, it is indicative of a similar effort to keep operations distinct that measures were taken to formalize actions when such unofficial advise or representation needed to be formalized. The district court thus correctly determined that Gibraltar failed to prove that any of the particular instances in which LDBrinkman Corp. personnel acted on behalf of the Brinkcraft subsidiaries or required acts on their part constituted an abuse of their corporate identity.

BI's and BDI's boards were completely distinct from, even if subservient to, LDBrinkman Corp. This would be virtually fatal to any "alter ego" claim, though the opposite—the mere fact of interlocking directorates and officers—could not turn separate corporations into "alter egos." From all this, it is clear that LDBrinkman Corp. maintained the separate legal and factual existence of the Brinkcraft subsidiaries with much more than "just a piece of paper lying in a file cabinet." *Edwards Co. v. Monogram Indus., Inc.*, 730 F.2d at 985.

In *Lucas v. Texas Indus., Inc.*, 696 S.W.2d 372 (Tex. 1984), the Texas Supreme Court refused to find that a parent company was the "alter ego" of its subsidiary where enumerated common characteristics did not exist. As applied to the instant facts the catalogued indicia in *Lucas* provide a convenient summary: (1) that there was not a *complete* disregard of corporate formalities; (2) that efforts were made to keep minutes and records of intracompany transactions; (3) that complete and separate corporate and financial records were maintained; (4) that separate bank accounts were maintained and that property and assets were not indiscriminately com-

mingled; (5) that stockholder and director meetings were held; (6) that officers and directors were not only not identical, but were not even substantially overlapping; (7) that there were differences in the business activities and offices of the holding company and the Brinkcraft subsidiaries; and (8) that Gibraltar was in no way confused about LDBrinkman Corp.'s formal distance from, and lack of legal liability for, the BDI loan.

Turning to the "mere tool or business conduit" instruction, this was also an attempt to instruct the jury on "alter ego" proper. *Castleberry*, 721 S.W.2d at 272 (citing *Pacific Am. Gas.*, 76 S.W.2d at 851); *Gentry v. Credit Plan Corp.*, 528 S.W.2d at 573, *cited with approval in Castleberry*, 721 S.W.2d at 273. The focus of "alter ego" is on the relationship between the corporations whose identities are sought to be collapsed; use of subsidiaries as conduits for business beneficial to ~~a parent~~ or owner does not—alone—establish liability. Ratcliffe's "admission" that he simply chose BDI to be the instrumentality for securing additional funds for the Brinkman empire is not as decisive as Gibraltar argues.

At all times relevant to this dispute, the Brinkcraft subsidiaries were run as separate and legally distinct corporations. All corporate formalities were maintained. The normal exercise of the rights and powers incident to ownership does not raise an "alter ego" question of whether the corporation was a "mere tool or business conduit" of its owners. There was simply no evidence in this case of *any* improprieties in the manner in which BDI and its subsidiaries, parent, overall parent, or other affiliates were operated.

With respect to Brinkman's liability as "alter ego" for LDBrinkman Corp., we must reach the same result. The holding company's stock was publicly traded; the holding company had some 1700 direct shareholders; appropriate filings were made with the Internal Revenue Service, the Securities and Exchange Commission, and

other governmental bodies; regular minutes, board meetings, and like formalities were observed; there was an audit and conflict committee upon which Brinkman did not serve; and it had three outside directors on its board besides the president of a subsidiary and Brinkman. These formalities properly isolated Brinkman from individual liability on a theory of "alter ego" proper.

Absent such a showing of substantial record evidence of both legal and factual lack of separateness, it is clear that there was an insufficient showing to create a material question that BI or BDI was operated in such a fashion as to create classic "alter ego" liability on the part of either LDBrinkman Corp. or Brinkman. *Pace Corp. v. Jackson*, 155 Tex. at 190, 284 S.W.2d at 351. The "alter ego" issue should not have been submitted to the jury. *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 260 (5th Cir. 1980); *Boeing Co.*, 411 F.2d at 374-75. Accordingly, judgment notwithstanding the verdict was appropriate.

E The Third Ground for Corporate Disregard.

Gibraltar makes two arguments to sustain the legally defective "alter ego" theory of its case: first, that before *Castleberry*, Texas veil-piercing law had not categorically distinguished between the classic "alter ego" and "sham to perpetrate a fraud" prongs for corporate disregard; and second, that "conduit" liability (which was charged to the jury) overlaps both "alter ego" and "sham to perpetrate a fraud," and thus implicitly can establish liability under the latter denomination.

However, *Castleberry* itself states that the various strands were distinct in prior caselaw and that, while circumstances might support disregard under multiple theories, each must stand by itself, under each individual test. *Castleberry* also placed "conduit" doctrines squarely and solely as an element of the "alter ego" analysis. 721 S.W.2d at 272 (citing *Pacific Am. Gas.*, 76 S.W.2d 851).

Undaunted, however, by the categorical rejection of just these arguments in *Valdes*, 810 F.2d at 1353 n. 7, Gibraltar emphasizes the jury's fraud findings and the soiled facts of this case, which we admit put the equities on the lender's side. The only prop which Gibraltar retains is thus that LDBrinkman Corp.'s entire scheme was fraudulent.

The "sham to perpetrate a fraud" basis for corporate disregard rests upon the abuse of corporate forms "as part of a basically unfair device to achive an inequitable result." *Castleberry*, 721 S.W.2d at 271. It is evident that LDBrinkman Corp.'s management utilized the Gibraltar loan principally to benefit the holding company and not the Brinkcraft subsidiaries or BDC's real estate partnerships. A decidedly unequal allocation among parent and subsidiaries of the costs and benefits of the corporate form, or their use to shift the costs and risks of business to outside parties, may justify disregarding corporate identities, even where all the legal formalities have been maintained. *See Pan Eastern*, 855 F.2d at 1135. It is a fact question whether there existed such a "profound asymmetry in the behavior of the managers of the [parents] and their affiliates, [that] a reasonable juror could conclude that now 'recognizing the separate corporate existence would bring about an inequitable result.'" *Id.* (quoting *Castleberry*, 721 S.W.2d at 273).

With respect to Brinkman, Gibraltar contends that he "habitually" utilized his various companies "as his personal credit card for more than $200,000 per year in personal and household expenses," and in particular looted the Brinkcraft subsidiaries immediately after securing the loan. In Texas, when a corporate officer or other fiduciary is self-serving in his use of corporate rights or property, disregarding the corporate veil may be appropriate. *Rose v. Intercontinental Bank, N.A.*, 705 S.W.2d 752, 755 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Tigrett v. Pointer*, 580 S.W.2d 375 (Tex.Civ.

App.—Dallas 1978, writ ref'd n.r.e.). Again, however, Brinkman's alleged "self-dealing" abuse of the subsidiaries' assets fits solely a "sham to perpetrate a fraud" theory, and this question was not squarely presented to the jury; in fact, much of the evidence on both sides of this issue was excluded.[21]

Looking from the bottom up, instead of from the benefit running to the holding company and Brinkman, Gibraltar argues that BDI was, and is, admitted to be a mere shell, and reasonable jurors could have found sufficient evidence that LDBrinkman Corp.'s and Brinkman's loose and grey division between the subsidiaries, as well as "looting" and "draining" BI and BDI assets, amounted to a "sham to perpetrate a fraud" on Gibraltar. Whether that could have been established to the jury's satisfaction, the fact is that Gibraltar failed to make out a clearly-presented case that financial manipulations by Brinkman and LDBrinkman Corp. "propped it up" as a mere shell and conduit that allowed the subsidiaries to generate improperly-siphoned profits for a longer period than otherwise would have occurred. The maintenance of BDI's timely loan payments solely through LDBrinkman Corp. advances (one made directly to the lender), so as to postpone concern over the borrower's ability to meet the debt service and thus delaying an allegedly inevitable default, also might have evidenced "a sham to perpetrate a fraud"; but such a scheme was not presented to the jury, which, consequently, did not have an opportunity to prevent an "inequitable result."

Not only is the reliance component (what Gibraltar knew or reasonably believed about BI and its operation

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[21] The court allowed only limited testimony regarding Brinkman's conduct with respect to dividends, annual bonuses, and the like. While his "conspicuous consumption" was documented to some extent, this evidence was itself curtailed because the judge viewed it as without "a frazzling thing to do with this lawsuit"; similarly,

of BDI) of such a conclusion a clear question of fact,[22] but *Castleberry* makes plain that it is a jury question whether there was unfairness or injustice to the creditor-claimant caused by the use of "shell" companies or by the evasion of existing legal obligations. Noting that Gibraltar sought and obtained a chattel lien and the holding company's guaranty on the refinancing of Commercial Aviation's $3 million Lloyds loan, we express no *legal* opinion as to estoppel or as to whether the failure to seek a guaranty from either LDBrinkman Corp. or Brinkman affects the reliance component which Gibraltar would have faced. We acknowledge, however, Gibraltar's *factual* obstacle on the reliance issue.[23] It is obvious that

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whether he reimbursed advances, or they were offset against his annual bonus, or whether he paid interest thereon, and was suppressed for the most part.

[22] *Rose*, 705 S.W.2d at 755; *Atomic Fuel Extraction Corp. v. Slick's Estate*, 386 S.W.2d 180, 191 (Tex.Civ.App.—San Antonio 1964, writ ref'd n.r.e.).

[23] *Compare Sagebrush Sales Co. v. Strauss*, 605 S.W.2d 857 (Tex. 1980) (jury found that the business affairs of the individual were indistinguishable from the business affairs of the corporation; that the creditor corporation relied on the personal financial statements of the individual; and that the defendant intended to cause its creditor to believe that credit was being extended to him individually) *with Pace Corp. v. Jackson*, 155 Tex. at 190, 282 S.W.2d at 351 ("Respondent was as well acquainted with the financial structure of Pace Corporation as were [the individual owners].") *and Hanson Southwest Corp. v. Dal-Mac Constr. Co.*, 554 S.W.2d 712, 718 (Tex.Civ.App.—Dallas 1977, writ ref'd n.r.e.) ("[Entering voluntarily] into the contract [though] realizing that it [the 'shell'] might not be financially sound and despite fruitless efforts to obtain a guarantee from the parent company[, plaintiff construction company cannot now pierce the defendant's corporate veil].") *and Paine v. Carter*, 469 S.W.2d 822, 827 (Tex.Civ.App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.) ("[T]he contract recognizes and assumes the separate existence of [the companies. Choosing] to deal with both . . . in their separate legal capacities [, their independence will not be disregarded now . . . .] Moreover, where a party knows of the relationship between a corporation and its shareholders and chooses freely and voluntarily to deal with them in their respective capacities, he is estopped to claim that the cor-

the general corporate structure of Brinkman's empire was known to Farlow and the members of the loan committee. From the financial information in Gibraltar's possession, it is also evident that the lender was amply aware that BDI had no individual assets and was operated as a "shell."

Similarly, we must agree with LDBrinkman Corp. that the issue of repayment of LDBrinkman Corp.'s advances to both BI and BDI from the subsidiaries' assets would not have assisted Gibraltar in a "sham to perpetrate a fraud" inquiry. There were independent jury findings adverse to Gibraltar with respect to early repayment of intercompany debt while BDI, and in turn BI, were left to default on Gibraltar's loan. While Gibraltar employs sinister phrases such as "looting," "siphoning off," "cannibalizing the last few scraps off the body," and "tossing the corpse," these accusations are only a rehashing of the lender's complaint that LDBrinkman Corp.'s advances to the Brinkcraft subsidiaries *should have been judicially subordinated* to Gibraltar's loan.

But the jury found that LDBrinkman Corp. did *not* agree to subordinate its debt to Gibraltar's and committed no fraud in this regard. Gibraltar knew of the inter-company debt between the Brinkcraft subsidiaries and LDBrinkman Corp. but failed to protect itself with a subordinate agreement from LDBrinkman Corp. Corporate disregard cannot write new terms for a loan. Since LDBrinkman Corp. breached no contract and committed no fraud, Gibraltar cannot use a veil-piercing theory to create a subordination agreement which Gibraltar never sought.

Similarly, Gibraltar complains about the use of the loan proceeds, on the day of the loan, in another at-

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porat[e form should be ignored].") *and Atomic Fuel*, 386 S.W.2d at 191 ("Atomic, with full knowledge, chose to deal with the corporations to the exclusion of [the owner].").

tempt to show that repayment of advances from LD Brinkman Corp. defaulted it. However, the jury found that LDBrinkman Corp. did not commit fraud with respect to the use of the loan proceeds. Again, Gibraltar obtained no contractual restrictions on the use of the loan proceeds, and cannot now complain of "misapplication." Since we cannot term these jury findings clearly erroneous, we hold that any "sham to perpetrate a fraud" would not have been supported by these rejected contentions.

Since Gibraltar did not (1) ask the district court to submit a clear "sham to perpetrate a fraud" count to the jury, (2) submit appropriate jury charges to the court covering this theory, or (3) object (because it omitted this veil-piercing theory) to the special verdict form which the judge used, Gibraltar does not enjoy the right to retry its corporate disregard case on this theory now. Simply submitting its own substitute form of special interrogatories does not entitle Gibraltar to a second crack at veil-piercing, and it is beyond our province to rule upon this alternate ground for corporate disregard, which Gibraltar simply failed adequately to put before the jury.

Because of this holding, we decline to reach Brinkman's contention that so long as LDBrinkman Corp. has assets to meet a judgment against it, there is no basis to pierce the veil to establish personal liability on his part. The Texas cases upon which he and the district court relied may indeed inoculate him from the burden of the jury determination, so long as LDBrinkman Corp. was able to satisfy Gibraltar Savings' recovery. *See Lucas v. Texas Indus., Inc.*, 696 S.W.2d at 375; *Hanson Southwest Corp. v. Dal-Mac Constr. Co.*, 554 S.W.2d at 718.

VIII. *Attorneys' Fees.*

Recognizing that neither Brinkman nor LDBrinkman Corp. stood, absent "alter ego" liability, in privity to the

lender, the trial court nonetheless held that the fraud recovery "sounded in contract.'" Based upon *Milton v. Aranas Shrimp Coop.*, 668 S.W.2d 735 (Tex.App.—Corpus Christi 1984, error dism'd), and *Collin County Sav. & Loan v. Miller Lumber Co.* 653 S.W.2d 114 (Tex.App. —Dallas 1983, no writ), the district court granted an amended fee of $332,500. We reverse the award of attorneys' fees.

If we were to uphold the "alter ego" finding, LDBrinkman Corp. might be liable for attorneys' fees as if it were a contractual maker or guarantor of the note. Tex. Civ.Prac. & Rem.Code § 38.001 (Vernon's Supp.1987). Because such liability was not established, we express no opinion on whether disregard alone would activate section 38.001 and entitle Gibraltar to attorneys' fees. We also determine at this juncture to address the "presentment" question and other alleged bars to an attorneys' fees award which the defendants assert.

The claims directly against LDBrinkman Corp. and Brinkman (fraud in the inducement and tortious interference with contractual relations) "sound in contract," and so the lender contends that fee-shifting may be appropriate on the fraud claims alone. There is admittedly no requirement in the statute (or its predecessor, Tex. Rev.Civ.Stat. art. 2226, *repealed* eff. Sept. 1, 1985), that the action be for enforcement of an oral or written contract, or even that it be against a contracting party. It is sufficient if the action arises out of a relationship contractual in nature or essentially "one sounding in contract." *Milton*, 668 S.W.2d at 737; *Alaimo v. Woodlands Nat'l Bank*, 698 S.W.2d 234 (Tex.App.—Beaumont 1985, no writ); *Higgins v. Smith*, 722 S.W.2d 825 (Tex. App.—Houston [14th Dist.] 1987, no writ).

Gibraltar argues that its suit is founded upon written contractual agreements, i.e., the note and the various guaranties, and accordingly that its suit is one that sounds in contract; therefore, it argues that LDBrink-

man Corp.'s fraudulent representations made to induce the loan "sound in contract" and that hence attorneys' fees are recoverable. The fraud "exception" has never been extended beyond suits between parties bound by a contract, however, and we decline to apply the statute to a third party not in privity, simply upon an allegation (even when proven to the satisfaction of a jury) that that third party tortiously interfered with the contract or fraudulently induced it. *See Marcus, Stowell & Beye Gov't Sec., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 233-34 (5th Cir. 1986); *Neeley v. Bankers Trust Co.*, 757 F.2d 621, 633-34 (5th Cir.1985).

IX. *Usury.*

In its first and second amended complaints, Gibraltar prayed to "recover from the Defendants jointly and severally . . . for the liquidated sum of $5,000,000.00 plus interest as provided in the Note herein described." In its third amended complaint, that prayer was dropped. Because Texas cases hold that amendment of a pleading does not cure a usurious interest charge created by the filing of an earlier pleading and does not relieve a lender from liability under the statute, the defendants cross-claimed that Gibraltar "charged" interest against them in violation of Texas' usury statute. Tex.Rev.Civ.Stat. Ann. art. 5069-1.06.[24]

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[24] As the district court noted, defendants' $2,361,678 demand for statutory usury treble damages is completely unsupported by the evidence; what calculation allowed them to reach the base sum they utilized escapes us, as it did the district court. Neither in their appellate briefs, nor at oral argument, could LDBrinkman Corp.'s present counsel satisfy this confusion. Reference to interest accrued at the time of trial and to the cross-examination of Hollingsworth indicates the interest claimed to that time on the loan, but why LDBrinkman Corp. chooses that sum (without set-off for statutory prejudgment interest, we note) eludes our understanding.

Assuming that the usury counterclaimed based upon the superseded pleadings of Gibraltar was squarely presented,[25] we agree with the district court, however, that the factually-similar case of *Fibergrate Corp. v. Research-Cottrell, Inc.*, 481 F.Supp. 570 (N.D.Tex.1979), is fully dispositive of the defendants' usury counterclaimed. There, the defendant's motion for summary judgment was predicated upon an allegedly impermissible request for interest contained in the plaintiff's damage prayer. In denying defendant's motion, then District Judge Higginbotham observed,

> A permissible construction of [the usury provision] is that a creditor seeking to recover interest as damages is not making a 'charge' of interest. The interest claim is not rooted in a free contractual relationship between two private parties, but is an element of nonconsensual damages.

Id. at 572. While later state cases arguably are at variance with the outcome of *Fibergrate*, nothing has

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[25] There are Texas cases that imply, based upon state civil procedure anomalies, that amendment of the pleadings does not cure usury created by the filing of an earlier pleading. *See, e.g., Tyra v. Bob Carroll Constr. Co.*, 639 S.W.2d 690 (Tex. 1982); *Nationwide Fin. Corp. v. English*, 604 S.W.2d 458 (Tex.Civ.App.—Tyler 1980, writ dism'd). However, under Fed.R.Civ.P. 15, an amended pleading is expressly deemed to "relate back" to the commencement of an action. Notwithstanding what may be the rule prevailing in the Texas state courts, in a diversity case rule 15 is procedural, and this question should be viewed solely as a matter of federal law. *See, e.g., Seidman v. Fishburne-Hudgins Ed. Found., Inc.*, 724 F.2d 413 (4th Cir. 1984); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606 (4th Cir.), *cert. dism'd*, 448 U.S. 911, 101 S.Ct. 25, 65 L.Ed.2d 1141 (1980); 3 J. Moore, *Moore's Federal Practice* ¶ 15.02[3] at 15-16 (2d ed. 1985). The filing of the third amended complaint thus defeats the usury argument since, as Gibraltar correctly contends, there is no comparable federal rule creating a cause of action, for usury or otherwise, solely from the pleadings.

directly impeached its authority, and we find its reasoning persuasive.[26]

The initial two complaints were against more defendants than the two remaining here. Gibraltar may have inartfully drafted its prayer for relief, but the interest claimed was clearly proper against those who were contractually bound to pay the note. The district court chose to read the first and second complaints as seeking the interest *eo nomine* solely from BDI and the guarantors.[27] Against these parties, the district court entered judgment in granting the motion for summary judgment. After this judgment, Gibraltar amended its complaint to remove the prayer for contractual interest.[28]

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[26] *See Danziger v. San Jacinto Sav. Ass'n*, 732 S.W.2d 300, 305 (Tex. 1987) (Gonzalez, J., concurring) ("This court has not directly faced this issue [whether] pleadings alone can constitute the charging of usurious interest. . . . The better rule is that the filing of a petition may constitute the charging of usurious interest *only* when the underlying agreement is usurious[, because] the usury must be established on the face of the loan instrument [and] errors in drafting of a complaint cannot change the terms and meaning of the original agreement.") (emphasis in original; citing *Fibergrate* and distinguishing *Tyra* and *Nationwide Fin.*; other citations omitted).

[27] As to Brinkman, the district court also held that he lacked standing to assert the statutory penalties for usury, because—as a non-obligor—he had no contractual liability absent a finding of "alter ego" liability. *Greenway Bank & Trust v. Smith*, 679 S.W.2d 592 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). We express no view whether this is a correct reading of the usury provision.

[28] *See Petroscience Corp. v. Diamond Geophysical, Inc.*, 663 S.W.2d 68, 70 (Tex.App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) ("We hold that when a pleading (constituting the sole evidence of a "charge") admittedly seeking a usurious rate of interest is abandoned and amended so as to seek a lawful interest rate before any defense of usury is asserted, as a matter of law no usurious 'charge' has been made."). *See also Killebrew v. Bartlett*, 568 S.W.2d 915, 917 (Tex.Civ.App.—Amarillo 1978, no writ) (second amended complaint dropped usurious interest demand, so jury's

None of the cases cited by the defendants approaches the facts here. There was no underlying usury, as necessary under the reasoning of Justice Gonzalez's *Danziger* concurrence. We also cannot say that clear error is presented by the district court's reading of the first and second complaints as (impliedly) limited to the borrower and guarantors—thus presenting LDBrinkman Corp. no usury claim at all. Indeed, one unique circumstance amply distinguishes defendants' cited authority: Had the "alter ego" finding not been vacated by the district judge, then defendants would have been held to have contracted for the interest; Gibraltar's original prayer for relief would thus have been proper against them as well as against BDI and BI and the individual guarantors.

X. *The Other Findings.*

We now turn to the jury findings of LDBrinkman Corp.'s tortious interference with the contractual relations between Gibraltar and LDBrinkman Corp.'s Brinkcraft subsidiaries and of fraud in two of Ratcliffe's representations to Farlow. For reasons that will be explained, the judgment on the first fraud count cannot stand, but we uphold that portion of the verdict that was based upon the second fraud finding and the finding of tortious interference with business relations. We also hold that the amount of damages was erroneously determined and must be adjusted.

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refusal to find usury left undisturbed because debtor failed to prove "charging" as a matter of law); *but see Missouri-Kansas-Texas R.R. v. Fiberglass Insulators*, 707 S.W.2d 943, 950 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (based upon pre-*Danziger* dicta from the Supreme Court and distinguishable appellate precedent, questioned implications of *Petroscience* and even the validity of *Killebrew*, but nonetheless concluded that oral usurious interest demand was not a "changing"; no usurious pleadings had been filed).

A. Sufficiency of the Evidence.

In reviewing the sufficiency of the evidence to support the jury verdict, a court of appeals must consider all of the evidence, drawing all reasonable inferences in favor of the prevailing party. *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018 (5th Cir.1979). The appeals court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different conclusions or because the court feels other results would have been more reasonable.[29] Weighing the conflicting evidence and the inferences to be drawn from that evidence, and determining the relative credibility of the witnesses, are the province of the jury, and its decision must be accepted if the record contains any competent and substantial evidence tending fairly to support the verdict. *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir.1985).

Substantial evidence, while something less than the weight of the evidence, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence. *Refrigerated Transp. Co. v. ICC*, 663 F.2d 528 (5th Cir. Unit B Dec. 1981); *Solis v. Rio Grand City Indep. School Dist.*, 734 F.2d 243 (5th Cir.1984). Under this standard, it is not the function of the appeals court to reverse merely if it believes the evidence might have supported a different verdict. If there is an evidentiary basis upon which the verdict can be supported, the jury's determinations will be left undisturbed, even where there is substantial contradictory evidence that could have supported an opposite verdict.[30]

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[29] *Pope v. Rollins Protective Serv. Co.*, 703 F.2d 197 (5th Cir. 1983); *Nowell v. Dick*, 413 F.2d 1204 (5th Cir. 1969); *Ford Motor Co. v. Mathis*, 322 F.2d 267 (5th Cir. 1963).

[30] *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 519 (5th Cir. 1985); *Conan Properties, Inc. v. Conans Pizza, Inc.*, 752 F.2d 145 (5th Cir. 1985); *Wood v. Diamond M Drilling Co.*, 691 F.2d

"We decide only if reasonable jurors could agree with this verdict." *Texoma AG—Products, Inc. v. Hartford Acc. & Indem. Co.*, 755 F.2d 445, 448 (5th Cir.1985).

B. Tortious Interference with Contractual Relations.

The jury found that LDBrinkman Corp.'s officers tortiously interfered with BDI and BI's obligations under the loan and the parent's guaranty. Gibraltar did not emphasize this claim at trial, and neither side adequately briefed the issue on appeal. We conclude, however, that this jury finding was supported by the evidence, and that judgment—in an amount as will be discussed—on this verdict is appropriate.

Texas law on a third party's wrongful interference with contractual obligations is well-developed, and we have often been called upon to interpret it.[31] Under Texas common law, the elements of a cause of action for tortious interference with contractual relations are: (1) a contract; (2) an intentional and wilful act, interfering with the contract, that was calculated to cause damage to the plaintiff; (3) the lack of any legally justifiable cause or excuse on the part of the defendant; and (4) actual damages.[32] The court's charge thoroughly ex-

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1165 (5th Cir.), *cert. denied*, 460 U.S. 1069, 103 S.Ct. 1523, 75 L.Ed.2d 947 (1982); *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. 1978).

[31] *E.g., Hi-Line Elec. Co. v. DowCo Elec. Prod.*, 765 F.2d 1359, 1362 (5th Cir. 1985); *C.E. Serv., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1248 n. 10 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 604, 88 L.Ed.2d 583 (1985); *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189-90 (5th Cir. 1984); *Cook Indus., Inc. v. Community Grain, Inc.*, 614 F.2d 978, 980 (5th Cir.), *cert. denied*, 449 U.S. 952, 101 S.Ct. 356, 66 L.Ed.2d 216 (1980).

[32] *Clements v. Withers*, 437 S.W.2d 818, 821 (Tex. 1969); *White v. Larson*, 586 S.W.2d 212, 215 (Tex.Civ.App.—El Paso 1979, no writ); *Armendariz v. Mora*, 553 S.W.2d 400, 404 (Tex.Civ.App.—El Paso 1977, writ ref'd n.r.e.).

plained these elements and specifically emphasized excuse or privilege, which had been argued to defeat the cause of action in unsuccessful motions for summary judgment and directed verdict.[33]

The jury finding that LDBrinkman Corp. wrongfully interfered with BDI's contractual obligation under the note provides ample support for the verdict, even if the jury found no separate damages for this interference. The finding that Gibraltar sustained no damage is inconsistent with the finding of interference. However, inconsistent jury responses require a remand for a new trial only if the answers are irreconcilable. *Willard v. The John Hayward*, 577 F.2d 1009 (5th Cir.1978). Evidently, the jury intended to avoid a "double recovery," and if the verdict is to be given effect, the judgment may be sustained on this alternate ground. *See Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 781 (5th Cir.1986), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1892, 95 L.Ed.2d 449 (1987).

C. Fraud.

Under Texas law, a plaintiff may recover for fraud upon establishing that (1) the defendant made a false

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[33] The final instruction painstakingly elaborated the law:

> Gibraltar also contends that LDBrinkman Corporation and Lloyd Brinkman, individually, wrongfully interfered with the contractual obligation of Brinkcraft Development, Inc. under its note to Gibraltar. To prove wrongful interference, Gibraltar must prove each of the following elements by a preponderance of the evidence. First, the existence of a contract. Second, an intentional and willful act of interference with the contract that was calculated to damage Gibraltar. Third, lack of sufficient excuse or justification on the part of what was alleged to have interfered and, fourth, that such intentional act was a proximate cause of actual damages. *You are instructed that interference with contract is privileged where it results from the exercise of a party's own rights or where the party possesses an equal or superior interest to that of the Plaintiff in the subject matter.* [Emphasis added.]

material representation consisting of either a positive untrue statement of material fact, the *concealment of a material fact, or nondisclosure of a material fact which he had a duty to disclose*; (2) the defendant knew the material representation was false or made it recklessly without any knowledge of its truth; (3) he made the representation with the intent that it should be acted upon by the plainitff; (4) the plaintiff acted in reliance upon the representation; and (5) the plaintiff suffered injury.[34] In Texas a plaintiff may recover for fraudulent inducement to enter a contract based upon either misrepresentation of a past or existing fact ("false statement") or the intentional tort of "false promise,"[35] which requires proof of an *intention not to perform at the time the representation was made. Fredonia Broadcasting Corp. v. RCA Corp.*, 569 F.2d 251, 258 (5th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed. 2d 167 (1978).[36]

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[34] *Stone v. Lawyers Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977); *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 516 S.W.2d 138, 143 (Tex. 1974); *Oilwell Division, U.S. Steel Corp. v. Fryer*, 493 S.W.2d 487, 491 (Tex. 1973); *see also Valdes*, 810 F.2d at 1350; *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1171-72 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007, 103 S.Ct. 1245, 75 L.E.2d 476 (1983).

[35] This fraud theory is called misrepresentation of future intendment in some of the older cases. *See, e.g. Statham v. City of Tyler*, 257 S.W.2d 742, 744 (Tex.Civ.App.—Texarkana 1953, writ ref'd n.r.e.).

[36] The trial court properly and comprehensively instructed the jury on this point:

> A promise to do something in the future cannot be the basis of a claim for fraud unless the promissor, at the time he made the promise, made it with a positive intent not to perform it. Mere failure to perform a promise to do something in the future does not establish that a party had no intention to perform at the time the promise was made.

Five alleged misrepresentations made by Ratcliffe to Farlow were presented to the jury; only two were found to have constituted fraud (broadly defined in the instructions). The answers to interrogatories set forth in the footnote constituted the jury's acceptance of proof with regard to the various representations which Gibraltar claimed fraudulently induced it to issue the loan to BDI.[37]

1. *Understatement of BDI's Total Debt.*

The defendants have highlighted a major problem with the first fraud count with respect to the finding of fraud in Ratcliffe's representations of BDI's financial situation and the amount of its outside debt.[38] The pretrial order

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[37] The subject interrogatories and answers read as follows:

1. Do you find that LDBRINKMAN CORPORATION committed fraud against GIBRALTAR SAVINGS by making any of the following alleged misrepresentations:

ANSWER: "YES" OR "NO" AS TO EACH.

(a) That the total existing debt of Brinkcraft Inc. other than the debt owing to LDBrinkman Corporation did not exceed $2,500,000.

Answer: *Yes.*

(b) That the business of Brinkcraft, Inc. and Brinkcraft Development, Inc. was ongoing and successful in scope.

Answer: *Yes.*

* * * *

ANSWER QUESTION NO. 2 ONLY IF YOU ANSWERED "YES" TO ANY PART OF QUESTION NO. 1, OTHERWISE SKIP TO QUESTION NO. 5.

2. What amount of money, if paid now in cash, do you find would fairly and reasonably compensate GIBRALTAR SAVINGS for the fraud, if any, committed against it by the LDBRINKMAN CORPORATION?

Answer: *$6,000,000.*

[38] These representatives were obviously false in several respects. BDI had "outside debt" (i.e., debt owed to banking institutions) of nearly $1 million beyond the $2.5 million owed to Banc-Texas. It

and the special interrogatory submitted to the jury addressed only the misrepresentation of total existing debt of Brinkcraft, Inc. Gibraltar acknowledges that the interrogatory should have referred to Brinkcraft Development, Inc.'s total debt. The issue becomes not whether there was ample evidence, but whether the jury was misled by the incorrect wording of the verdict form.

Gibraltar believes that the jury was not misled, first, because Gibraltar never contended that Ratcliffe represented that the outside debt of *BI* was only $2.5 million;[39] rather, he represented to Farlow that the outside debt of *BDI* did not exceed that amount. Second, Gibraltar argues that the verdict can be harmonized with the judgment; analogizing to the situation in which there are apparent conflicts between answers in a jury verdict, Gibraltar suggests that the question is whether the answer may fairly be said to represent a logical and probable decision on the issue as submitted, although the form of the issue or alternative selective answers prescribed by the court may have been the probable cause of the difficulty and produced the apparent conflict.[40]

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is undisputed that $475,000 was used out of the Gibraltar loan proceeds to reduce that additional outside debt, and that fact was not disclosed to Gibraltar until the June 10, 1985, meeting. Those funds were supposed to be used to complete the developments projects, the sale of which then would have been the source of repayment of Gibraltar's $5 million loan. Without such specific repayment arrangements, denominating the $2.5 (sic) for "working capital" would have been unnecessary; if Gibraltar had intended to allow the half not going to BankTexas as to be fully discretionary funds, such denomination, and indeed dividing the loan into halves, were merely superfluous.

[39] Gibraltar was given BI's audited financial statements revealing BI's outside debt to be much more than $2.5 million. These fiscal reports were put into evidence during the case in chief.

[40] *Griffin v. Matherne*, 471 F.2d 911, 917 (5th Cir. 1973); *R.B. Co. v. Aetna Ins. Co.*, 299 F.2d 753, 760 (5th Cir. 1962); *Aquachem Co. v. Olin Corp.*, 699 F.2d 516, 520 (11th Cir. 1983).

We cannot say, based upon our review of the record, that the jury was clearly not misled. Given the volume of evidence and testimony regarding multiple, overlapping businesses with similar names (referred to differently by different parties and witnesses) and about which at least two witnesses themselves misspoke,[41] the most attentive, careful, and clear-minded jurors might well have been confused regarding certain details.

But more is at stake in the misidentification of BDI's total indebtedness than simply whether the jury, overall, was misled. Because the pretrial order also contained the misnomer, Gibraltar should have been limited to evidence of fraud in BI's financial disclosures. While we can accept that the omission of the word "Development" in the relevant section of the pretrial order was merely an inadvertent oversight or typographical omission, we must hold that the pretrial order allowed proof only on a claim against BI.[42]

2. *Planned Dissolution.*

While vague statements regarding the future financial prospects of a commercial concern are nonactionable

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[41] Woody had to correct one reference he made to BI, when he had meant to say BDI. It also appears from context that Hufhines, BI's comptroller, misspoke in the same way during his testimony.

[42] Under Fed.R.Civ.P. 16(e), omission from the pretrial order means that a claim for misrepresentation of BDI's financial status was never properly incorporated into Gibraltar's case. *Valdes*, 810 F.2d at 1357; *Woods ex rel. Woods v. International Harvester Co.*, 697 F.2d 635, 639 (5th Cir. 1983). While evidence as to both BI's and BDI's finances was admitted (usually without objection), we have held that the Federal Rules of Civil Procedure prohibit creation and introduction of new facts, theories, or causes of action on the eve of trial, because a "defendant would be facing the possibility of being held liable under a claim it had no opportunity to evaluate and defend against." *Flannery v. Carroll*, 676 F.2d 126, 131 (5th Cir. 1982). *See also Valdes*, 810 F.2d at 1357; *Swift v. State Farm Mut. Auto. Ins. Co.*, 796 F.2d 120 (5th Cir. 1986)

opinion or future speculation,[43] it is well settled in Texas that a promise to do an act in the future is actionable as fraud where it is made with the purpose to deceive and without any intention of performing the promised act.[44] Beyond the falsity, reasonable reliance, and other elements of an ordinary fraud action, "false promise" requires proof of an intention not to perform at the time the representation was made. *Fredonia Broadcasting Corp. v. RCA Corp.*, 569 F.2d at 258.

The jury was properly instructed on the elements required of both the "false statement" and "false promise" strands of Texas law. Indeed, the defendants did not object to, and do not now challenge, the jury instructions on this issue. Contending that "[t]he events that destroyed the company—the downturn in the Texas economy and the $5[.5] million judgment from the construction lawsuit—occurred much later," the defendants obscure the fact that Gibraltar's "ongoing and successful" count focused not upon predictions of the Brinkcraft subsidiaries' anticipated profits, but upon its owners' concluded decision to divest the holding company of a subsidiary already viewed as "unprofitable" prior to Gibraltar's loan.[45] The debate thus is over the characterization of Ratcliffe's representations that the Brinkcraft subsidiaries were "on going and successful" and that LDBrinkman Corp. would continue to finance them so long as Gibraltar's loan was outstanding.

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[43] *Zar v. Omni Indus., Inc.*, 813 F.2d F.2d 689, 693 (5th Cir. 1987).

[44] *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432 (Tex. 1986); *Trenholm v. Ratcliff*, 646 S.W.2d 927 (Tex. 1983); *New Process Steel Corp. v. Steel Corp.*, 703 S.W.2d 209 (Tex.App.—Houston [1st Dist.] 1985, no writ).

[45] *Compare Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex 1977) *with William B. Roberts, Inc. v. McDrilling Co.*, 579 S.W.2d 335 (Tex.Civ.App.—Corpus Christi 1979, no writ). *See also Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 516 S.W.2d 138, 143 (Tex. 1974).

LDBrinkman Corp. would have us hold, as a matter of law, that such a statement was an ambiguous personal opinion at best, upon which no reliance could be reasonably placed and which, again as a matter of law, is not actionable under Texas law. Gibraltar, on the other hand, contends that the remarks were misstatements "both of existing fact and which in the context of this case, constituted a secret intention not to perform." Thus, as to a false representation of fact regarding the future performance of an act, Gibraltar's argument is that Ratcliffe's "promise" to fund BDI at least for the term of the loan "was clearly intended to mean and be perceived by [] Farlow and LDB[rinkman Corp.] would continue its financial support of the subsidiaries until the loan was repaid."

At several stages in the trial, Gibraltar's witnesses categorically declared that the loan would not have been issued but for the assurances that the Brinkcraft subsidiaries would remain as LDBrinkman Corp., operating units with the full backing of the holding company. Most importantly, Farlow extensively evaluated his discussions with both CFO Ratcliffe and in-house counsel Finley; he reiterated on several occasions his contemporary interpretation of the representations and how he related them to Hollingsworth.[46]

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[46] Farlow testified that Ratcliffe told him,

> [Y]ou know that Brinkman is not going to let one of his companies go bad and we are *going to keep this as a going concern,* and this money is going to enable us to work this situation out. [Emphasis added.]

Summarizing his testimony, Farlow said that he would not have recommended the BDI loan, and the loan committee surely would not have approved it, had it not been for the implied promise that LDBrinkman Corp. would continue to hold at least a one-half interest in the Brinkcraft subsidiaries. In response to a probing inquiry of his recollection of the purport of the "ongoing and successful" statements, Farlow testified:

> Ratcliffe and I had an understanding that . . . it would be a going concern as long as there was money owed to our company.

[Continued]

Given that the jury was properly instructed, the verdict evinces the jury's acceptance to Farlow's testimony. Its application of the facts under the law, as properly presented to it, was that these representations were not mere expressions of opinion or speculation of future profitability or other events, but rather were unambiguous declarations of positive fact secretly contradicted by prior LDBrinkman Corp. actions, or were a false assurance of a future course of LDBrinkman Corp.'s conduct, the performance of which had already been determined to the contrary.

The evidence was overwhelming that LDBrinkman Corp. had made the decision, *prior* to negotiating the loan, that it intended to sell or dispose of BI.[47] Yet it

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[46] [Continued]

> [H]e said they were not going to sell it, they were not going to dispose of it until we were paid off, so I assume that we are saying the same thing. It was never represented to me *any other way* [but] that they were ongoing, successful companies. [Emphasis added.]

[47] Ratcliffe's representations that BI and BDI were ongoing and successful in scope likewise were false representations, both of existing fact and as to LDBrinkman Corp.'s and Brinkman's secret intention not to perform. As evidenced by internal memoranda, LDBrinkman Corp. had determined, as early as March 1984, that BI was unprofitable and began its efforts to get rid of the subsidiary while negotiating with Gibraltar. When Herb Bradshaw was brought on board, it was expressly envisioned that he would divest BI. In June 1984, LDBrinkman Corp.'s board voted to dispose of BI for "80% of its book value." In LDBrinkman Corp.'s 1984 SEC filing, BI was "discontinued" as an LDBrinkman Corp. subsidiary effective August 1, 1984, and was no longer consolidated in LDBrinkman Corp.'s financial reporting. The appellant's brief itself admitted that "[d]iscontinuance reporting is simply a form of accounting required when a sale of business is contemplated." Since the Woody-McDougal buy-back had fallen through by this year-end filing, the contemplated sale was not that to management.

While the buy-back of BDI by the subsidiaries' officers would have left the parent corporation with significant interests in, and control over, the former subsidiary and left it as an "ongoing" enterprise, even after Woody and McDougal pulled out of the deal,

permitted Ratcliffe to represent that both BI and BDI were ongoing and would be allowed to operate, grow, and successfully repay their outside liabilities, knowing that Gibraltar would rely upon LDBrinkman Corp.'s promise to keep the subsidiary viable until the loan was repaid. This satisfies the requirement that the "false promises" be reckless or with knowledge of their falsity.[48] While a representation regarding the "ongoing" nature of subsidiaries which a parent corporation is selling to the subsidiaries' officers would not necessarily be false, in the context of this case these representations were hardly "ambiguous expressions of opinion" as suggested by LD Brinkman Corp.[49]

LDBrinkman Corp. continued the divestiture effort; on September 6, 1984 (the day after Farlow presented the loan documents to LDBrinkman Corp.'s officers in Kerrville and the day the BDI buyback was to occur), Ratcliffe made inquiries as to writing both BDI and BI off of the holding company's accounts. On September 14, 1984, the very day that Ratcliffe was signing the loan documents in Kerrville, LDBrinkman Corp.'s San Antonio accountants were obtaining information on how to treat BI as a "disposal segment" of the holding company's business.

[48] *Valdes*, 810 F.2d at 1350 n. 3; *J.L. Williams & Co. v. Robert E. McKee, Inc.*, 612 S.W.2d 649, 651 (Tex.Civ.App.—Dallas 1981, writ ref'd n.r.e.).

[49] Radcliffe represented that LDBrinkman Corp. would continue its financial support of BI and BDI until such time as the loan was repaid. LDBrinkman Corp. makes no contention that it was impossible for LDBrinkman Corp. to perform these promises; only that Gibraltar was not entitled to rely upon them. Given their past relationship, however, Farlow was justified in relying upon representations by his long-term friend and client. Ratcliffe selected BDI as a convenient "shell corporation" through which to borrow funds. Ratcliffe's representation that the subsidiaries would be "ongoing" was reasonably believed, and Farlow's testimony was accepted by the jury. Given that the jury was properly instructed, it must be presumed that it determined that these representations were an unambiguous declaration of positive facts which LDBrinkman Corp. secretly had already determined to contravene.

Thus, we reject the defendants' legal contention that the "ongoing and successful" statements were merely expressions of opinion and not promises as to existing facts required to impose liability for fraudulent inducement to contract. That Ratcliffe "promised" continued financial backing by the holding company is as apt a characterization of the questioned remarks as that they were, and were intended to be, personal opinions about future profitability and fiscal health. The materiality of such financing is undisputed, and that Gibraltar made inquiries of this nature and expressed concern over the holding company's intentions was testified to by both Hollingsworth and Farlow. Inferences reasonably drawn from these facts lead us to conclude that—in context—Ratcliffe's representations were not merely non-actionable statements of opinion. *See Valdes*, 810 F.2d at 1350.

It is also completely unavailing to argue that Farlow, if not others at Gibraltar, knew of the management buy-back that was contemplated for BDI, and that that reasonably should have put the lender on notice that LD Brinkman Corp. might otherwise dispose of or close down the operating subsidiaries. The interest which Woody and McDougal contemplated acquiring would have still left LDBrinkman Corp. with a controlling interest in the Brinkcraft subsidiaries and in each of the limited partnerships.

Furthermore, BI was a general partner and one-half owner in each of BDC's limited partnerships. Brinkman was a limited partner in some of those real estate projects. Additionally, he served as chairman of BDI and had a strong influence on BI. In the context in which Ratcliffe's representations were made, it would not be expected that LDBrinkman Corp. was going to cut the additional ties with the subsidiaries, even if Woody's buy-back had occurred. It was reasonable for the jury to find either that it was fraudulent not to disclose the concluded plans to divest the Brinkcraft subsidiaries or that the

assurance was a false promise that LDBrinkman Corp. would maintain its interest in them, either through continued control after the Woody-McDougal buy-back or otherwise.

Because of a supposed lack of sufficient record evidence on an essential element of fraud, LDBrinkman Corp. contends that there was no proof of reliance, even if we hold that Gibraltar could reasonably rely upon Ratcliffe's statements. The heart of this contention has two prongs: (1) that what little reliance testimony that was heard all concerned the supposed oral "subordination" agreement, and (2) that Farlow, from his past dealings with Brinkman's business empire and from the documents submitted by Ratcliffe, knew or should have known how the "shell" corporations and their cash surpluses were routinely utilized as momentarily most opportune for the holding company.

While there was ample proof of LDBrinkman Corp.'s lack of intention to perform in order to substantiate a "false promise" theory, no fraud claim could succeed without separate evidence of reliance.[50] Although reliance might seem almost unreasonable on the part of careful and considered lending officers, Farlow's testimony and that of other Gibraltar employees, to the effect that the loan would not have been made but for the "ongoing and successful" representation, constitutes proof of actual reliance on Gibraltar's part.

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[50] *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 519 (5th Cir. 1985) (failure to prove each element in relation to each alleged misrepresentation required reversal of general verdict of common-law fraud with regard to that statement); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 176 (5th Cir.1985) (when particular elements of a general verdict lack adequate support in the record . . . a new trial is required); *Statham v. City of Tyler*, 257 S.W.2d at 744 (failure to prove any element as to the five alleged misrepresentations of existing fact or future intendment entitled the defendant to summary judgmnt).

The defendants also argue that the data contained in the financial statements and annual reports reviewed by Gibraltar employees in the course of preparing the credit request and the spread sheets "negate justifiable reliance." However, while knowledge of facts that would lead a reasonably prudent person to conduct further inquiry to clarify a misimpression or reveal a misrepresentation can be deemed equivalent to knowledge of the truth,[51] we cannot agree that the interpretation of corporate records and divination of LDBrinkman Corp.'s and Brinkman's business intentions are tantamount to circumstances in which the plaintiff's possession of the defendant's accurate internal documents might foreclose a later claim that fraudulant statements misled the plaintiff and contradicted those documents.

We also cannot overlook this unequivocal evidence of Gibraltar's reliance upon the "ongoing and successful" assurances of continued funding, even though it is true that the thrust of Gibraltar's trial efforts on the five fraud claims, and most of the reliance testimony, concerned Ratcliffe's alleged representations regarding subordination and regarding divided payments (i.e., the third and fourth of the five alleged misrepresentations). It is true that the jury found no fraud in Ratcliffe's alleged promises that LDBrinkman Corp. would impose a moratorium on repayment of its advances to BI until Gibraltar was repaid, and would, in effect, subordinate the subsidiary's $7 million intercompany debt to the sum which BI contingently owed Gibraltar on the guaranty of the BDI loan. However, the jury's rejection of claims that those statements constituted fraud does not impugn its acceptance of other counts that are adequately supported in the record with respect to all essential elements of liability. Although the direct argumentation

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[51] *Laughlin v. FDIC*, 657 S.W.2d 477, 482 (Tex. App.—Tyler 1983, no writ); *Lewis v. River Oaks Capital Corp.*, 466 S.W.2d 348, 352 (Tex.Civ.App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

and proof of actual reliance could have been stronger, this is no more true with respect to the "ongoing and successful" count than with respect to the "subordination" counts.

We hesitate to overturn a verdict where the instruction was clear and unambiguous,[52] and we must agree that there was sufficient evidence to support the jury's finding of reliance. We disagree entirely with defendants' vehement contention that Gibraltar could not have relied as a matter of law. While the defendants' evidence of Farlow's zeal in pursuit of this loan, of his close association with both Brinkman and Ratcliffe, and that he was told more regarding the planned divestiture than what he admitted is all persuasive in comparison to the bare assertions of Gibraltar employees after the fact, such credibility choices are the jury's not ours; we refuse to substitute our reading of the evidence for that of a factfinder.[53] While we find the contradictory evidence and inferences persuasive, they are not so compelling as to allow us to supplant the jury's determination.[54]

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[52] The charge read:

> You are further instructed that fraud does not exist if a misrepresentation did not induce a transaction, did not deceive the injured person or otherwise affect his or its actions. In other words, if you find that the complaining party would have engaged in the transaction anyway and that the alleged misrepresentations had no effect upon the decision, there was no reliance and there can be no recovery.

[53] The parties' conflicting characterizations of the evidence are based upon the credibility or non-credibility assigned to certain witnesses, but "[i]t is not the function of this court to make credibility choices and findings of fact." *Reditt v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1386 (5th Cir.1983). *See also Smith v. Texas Dept. of Water Res.*, 799 F.2d 1026, 1031 (5th Cir.1986), *cert. denied*, —— U.S. ——, 108 S.Ct. 1012, 98 L.Ed.2d 977 (1988); *Ratliff v. Governor's Highway Safety Prog.*, 791 F.2d 394, 401 (5th Cir.1986); *Sylvester v. Callon Energy Serv., Inc.*, 724 F.2d 1210, 1216 (5th Cir.1984).

[54] If there had been a specific finding on reliance, we would be even more hesitant to overturn the verdict, but the obscurity of the

D. Proof of Damages.

LDBrinkman Corp's argument that Gibraltar failed to prove its damages is predicated on the contention that this was a "secured" loan. However, the loan was absolutely denominated an "unsecured working capital loan." The Woody, McDougal, and BI guaranties were not "security" [55] in the sense that a collateral pledge of the development partnerships' real property would have been.

LDBrinkman Corp. argues that Gibraltar had to continue to pursue McDougal and Woody, even though

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one element in a general instruction does not necessarily indicate that the jury ignored the individual elements of the claims presented to it. *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d at 518 ("The frailty of a general verdict does not absolve us from upholding it if possible. Cases that justify disregarding the jury's determinations seldom arrive in this court.").

We cannot conclude that the jury overlooked its duty to find each element specifically. We cannot say whether, if the issue had been squarely addressed, we would have found the testimony of Gibraltar's employees so insubstantial that no rational trier-of-fact could have found that Gibraltar actually relied; absent such a conclusion and without any indication, such as a faulty or less direct charge, that the jury did not address the reliance issue with respect to each count, we cannot hold that the record lacks sufficient evidence to allow reasonable jurors to find that the lender actually relied upon the "ongoing and successful" representation either in issuing the loan or in accepting only BI's guaranty, rather than demanding one from the holding company, *Texoma AG-Products, Inc. v. Hartford Acc. & Indem. Co.*, 755 F.2d 445, 448 (5th Cir.1985) ("We decide only if reasonable jurors could agree with this verdict.").

[55] A guaranty is an undertaking by the guarantor to answer for the payment of some debt or performance of a contract of another person in the event of the principal's default. It has independent value, *United States v. Vahlco Corp.*, 800 F.2d 462 (5th Cir.1986), but it is not such that Gibraltar's recovery should be discounted by more than the amount received in settlement from Woody and McDougal. Of course, the guaranty of an insolvent guarantor is worthless, and so BI's surety of its subsidiary has no present value. But the worth of the greed judgment against BI needs to be ascertained.

they did not participate in the loan negotiations and had no control over the disbursement of the loan proceeds or the use of the subsidiaries' assets. While Texas law requires that the principal be joined in a suit against the guarantor unless the principal is "notoriously insolvent," [56] the defendants cite no authority for their argued corollary rule, that the creditor must sue each guarantor. Gibraltar properly and legally compromised with the individual guarantors rather than force them into personal bankruptcy, and in no way thereby compromised claims against coguarantor BI or against the parent and owner under separate causes of action.[57]

The Texas authorities cited by LDBrinkman Corp. are securities cases without direct application to a case such as this.[58] LDBrinkman Corp.'s arguments based upon the law of fraudulent securities transactions is misplaced, because the straight loan of money without expectation of participating in the profits of the venture, as here, does not implicate the out-of-pocket limit on damages appropriate in actions under the securities laws.[59]

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[56] Tex.Civ.Prac. & Rem.Code § 17.001 (Vernon's) (formerly Tex. Rev.Civ.Stat.Ann. art. 1987, *repealed* effective Sept. 1, 1985).

[57] *Western Cottage Piano & Organ Co. v. Anderson*, 101 S.W. 1061, 1064 (Tex.Civ.App.—Fort Worth 1907, error ref'd) (plaintiff was not required to prove that a third-party's chattel mortgage was insufficient security for the loan which the defendant induced the plaintiff to make to that third party, in order for suit against the fraudulent inducer to go forward). *See also* 38 C.J.S. *Guaranty* § 92 (1987 Supp.); *United States v. Kohn*, 243 F.Supp. 293, 296 (W.D. S.C.1965).

[58] *E.g., In re Letterman Bros. Energy Sec. Litig.*, 799 F.2d 967 (5th Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. Unit A Mar. 1981), *aff'd in part, rev'd in part*, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983).

[59] *See McClure v. First Nat'l Bank*, 497 F.2d 490, 493-94 (5th Cir. 1974), *cert. denied*, 420 U.S. 930, 95 S.Ct. 1132, 43 L.Ed.2d 402

LDBrinkman Corp. also complains that the award of $6 million has no foundation in the evidence. It is quite apparent that in assessing Gibraltar's damages, the jury took into account not only the $5.0 million loan proceeds, but also the reasonable value of the use or detention of those funds through the time of trial. While the remaining defendants were not legally obligated for interest, equity might entitle the lender to such an amount as part of its damages.

Under several cases from the Texas state courts and federal courts construing Texas law, it has been held that an award of prejudgment interest is permitted under general principles of equity.[60] Gilbraltar would have been entitled to equitable prejudgment interest, which would have been assessed by the court in entering judgment upon the verdict. The jury knew that the interest accrued and unpaid to the time of trial was $787,226. However, the jury apparently selected a rate that equated to an amount somewhat greater than the rate provided in the note, this error must be reformed by the district

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(1975); *Bellah v. First Nat'l Bank*, 495 F.2d 1109, 1111 (5th Cir. 1974).

[60] *E.g., Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 485 (Tex.1978); *Crown Cent. Petroleum Corp. v. Nat'l Union Fire Ins. Co.*, 768 F.2d 632 (5th Cir.1985); *Union Bank v. First Nat'l Bank*, 677 F.2d 1074 (5th Cir.1982). In the recent landmark Texas case of *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552-53 (Tex.1985), the court held that in a tort action, interest as damages is compensation allowed by law "as additional damages for lost use of money" during the lapse of time between the accrual of the claim and the date judgment is entered. Citing numerous Texas decisions, the Texas Supreme Court held that plaintiffs have been permitted to recover prejudgment interest on both liquidated and unliquidated claims in both contract and tort disputes. *See, e.g., Miner-Dederick Const. Corp. v. Mid-County Rental Serv., Inc.*, 603 S.W.2d 193, 200 (Tex. 1980). The court concluded that as a matter of law, a prevailing plaintiff may recover prejudgment interest on damages that have accrued by the time of judgment. *Cavnar*, 696 S.W.2d at 554.

court to reflect the correct amount of prejudgment interest which Texas law allows.

Adjustment in accordance with actual damages also appears to be appropriate, because the district court apparently did not provide a credit for any sums actually received by Gibraltar from the settlements with Woody and McDougal and the agreed judgment against BI. Thus, on remand the district court should reduce the judgment by the amounts, if any, which Gibraltar has been paid by Woody, McDougal, and/or BDI, BI, and their successors.[61] We remand for this limited purpose only.

XI. *Conclusion.*

In summary, the district court correctly entered judgment in favor of Gibraltar and against LDBrinkman Corporation for $5,000,000, representing the principal amount due on the Gibraltar note from BDI. This recovery is subject to reduction for sums actually received by Gibraltar from McDougal and Woody on their settle-

---

[61] During appeal of this matter, Gibraltar finally entered a stipulation on June 1, 1988, that, if this judgment were affirmed by us, it would offset any direct recovery from LDBrinkman Corp. or Brinkman against the agreed judgment of $5 million and $5000 attorney's fees which it had previously obtained against the now-bankrupt successors to BI and BDI. *See Gibraltar Savings v. Lanchart, Inc. f/d/b/a Brinkcraft, Inc., et al.*, No. SA-85-2166 (W.D.Tex. Dec. 4, 1986). BI's guarantee may thus prove worthless, once the bankruptcy of its successor corporation is concluded, but if Gibraltar has received value on the agreed judgment, the lender cannot be allowed a double recovery.

Woody's and McDougal's settlement for $700,000 and the assignment of their interests in the joint ventures must be factored into any recalculation; whatever value Gibraltar thus recovered, or may realize, on the assignments, must offset the liability recognized by this decision. To the extent that Gibraltar is entitled to sums in excess of these prior recoveries on that debt, it may pursue LDBrinkman Corp., which enjoys a theoretical, if not realistic, right of contribution or subrogation against BI and BDI, if the now-bankrupt successor retains any assets.

ment with Gibraltar and from BDI, BI, and their successors in favor of Gibraltar. On remand, the district court will determine what sums Gibraltar has received from these sources and reduce Gibraltar's judgment accordingly. Gibraltar's recovery so computed shall be increased to reflect an appropriate amount of prejudgment interest.

We also affirm the district court's dismissal of Gibraltar's action against L.D. Brinkman individually, because we conclude that the district court correctly granted judgment notwithstanding the verdict on the jury findings accepting Gibraltar's "alter ego" theory of recovery against LDBrinkman Corp. and Brinkman individually. Because of our determination that the "alter ego" findings were Gibraltar's only predicate for recovery of attorneys' fees, our conclusion that the district court correctly set aside these jury findings also requires us to reverse the district court's award of attorneys' fees to Gibraltar. Accordingly, the judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5569

D.C. Docket No. SA-85-CA-2166

GIBRALTAR SAVINGS,
Plaintiff-Appellee
Cross-Appellant,

versus

LDBRINKMAN CORPORATION,
Defendant-Appellant
Cross-Appellee,

and

LLOYD D. BRINKMAN,
Defendant-Cross-Appellee.

Appeals from the United States District Court
for the Western District of Texas

Before GEE, DAVIS, and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellant cross-appellee pay to plaintiff-appellee cross-appellant the costs on appeal, to be taxed by the Clerk of this Court.

Filed December 2, 1988

Issued as Mandate: Jan. 11, 1989

APPENDIX C

**Order of the Court of Appeals
On Petition for Rehearing and
Suggestion for Rehearing En Banc**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5569

GIBRALTAR SAVINGS, A California Corporation,
Plaintiff-Appellee
Cross-Appellant,

versus

LDBRINKMAN CORPORATION,
Defendant-Appellant
Cross-Appellee,

and

LLOYD D. BRINKMAN,
Defendant-Cross-Appellee.

Appeals from the United States District Court
for the Western District of Texas

(December 30, 1988)

(Opinion December 2, 5th Cir. 1988, 860 F.2d 1275)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before GEE, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

Appellant's petition for rehearing correctly notes that there is no finding that "Gibraltar made out a case that Brinkman and LDBrinkman Corp. looted and drained the assets of the Brinkcraft subsidiaries," as erroneously stated in the opinion, *supra*, at 1286. That sentence is amended to read, "The plaintiff cannot switch from one veil-piercing theory to another."

The petition for rehearing also properly observes that Herb Bradshaw was not hired until January 1985, after the September 1984 loan had been made. Accordingly, the second sentence of Part III of the maj. op. *supra* at 1279, is amended to read, "Herb Bradshaw, senior vice president of LDBrinkman Corp., was hired some months before the default on the Gibraltar loan and was one of the prime movers in divesting the holding company of the Brinkcraft subsidiaries (*see infra* note 47); Gibraltar, indeed, offered proof that he was brought into the company with the thought that he would sell off or otherwise pare back the holding company's marginal operating subsidiaries."

These factual corrections do not affect the result. *See, e.g., Mulder v. Commissioner*, 861 F.2d 1333 (5th Cir. 1988) (per curiam) (on petition for rehearing). The petition for rehearing is DENIED, and no member of this panel nor judge in regular active service having requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and Loc. R. 35), the suggestion for rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

APPENDIX D

Amended Final Judgment of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-85-CA-2166

GIBRALTAR SAVINGS, a California Corporation

v.

LDBRINKMAN CORPORATION and
LLOYD D. BRINKMAN, Individually

AMENDED FINAL JUDGMENT

[Filed Aug. 24, 1987]

This case was assigned for trial on May 19, 1987, and there came the parties appearing through their respective attorneys of record and announced ready for trial. A jury of six qualified citizens of the Western District of Texas was empaneled and thereupon the parties proceeded to state the evidence and at the conclusion of which both sides rested.

The case was then submitted to the jury, and their verdict was returned into court on May 29, 1987. Based upon the pleadings, stipulations of the parties, the evidence and the jury verdict which is on file in the record of this case, which provides in relevant part as follows:

1. Do you find that LDBRINKMAN CORPORATION committed fraud against GIBRALTAR SAV-

INGS by making any of the following alleged misrepresentations:

ANSWER: "Yes" or "No" as to each.

(a) That the total existing debt of Brinkcraft Inc. other than the debt owing to LDBRINKMAN CORPORATION did not exceed $2,500,000.

ANSWER: Yes.

(b) That the business of Brinkcraft, Inc. and Brinkcraft Development Inc. was ongoing and successful in scope.

Answer: Yes.

ANSWER QUESTION NO. 2 ONLY IF YOU ANSWERED "YES" TO ANY PART OF QUESTION NO. 1, OTHERWISE SKIP TO QUESTION NO. 5.

2. What amount if [sic] money, if paid now in cash, do you find would fairly and reasonably compensate GIBRALTAR SAVINGS for the fraud, if any, committed against it by the LDBRINKMAN CORPORATION?

Answer: $6,000,000.[*]

9. Do you find that Brinkcraft Development, Inc. is (or was during the events made the subject of this case) the alter ego of Brinkcraft Inc.?

Answer "Yes" or "No".

Answer: Yes.

10. Do you find that Brinkcraft Development, Inc. is (or was during the events made the subject of this case) the alter ego of the LDBRINKMAN CORPORATION?

Answer: "Yes" or "No".

Answer: Yes.

---

* Note by counsel: Interrogatories 3 through 8 were omitted in the district court's judgment. The full text of the interrogatories and answers appears in Appendix E, *infra*, pp. 75a-79a.

11. Do you find that Brinkcraft Inc. is (or was during the event [sic] made the subject of this case) the alter ego of the LDBRINKMAN CORPORATION?

Answer: "Yes" or "No".

Answer: Yes.

12. Do you find that LDBRINKMAN CORPORATION is (or was during the events made the subject of this case) the alter ego of LLOYD D. BRINKMAN?

ANSWER: "YES" OR "NO".

ANSWER: YES.

the Court finds that the Plaintiff, GIBRALTAR SAVINGS, a California Corporation, should recover from the Defendant LDBRINKMAN CORPORATION, a Texas Corporation, the sum of Six Million Dollars ($6,000,000.00) with interest at the rate of 6.64% per annum from the date hereof, until paid in full.

The Court finds that the jury's findings concerning alter ego are not supported by the evidence and, therefore, shall be disregarded by the Court. First, with respect to the jury's finding of alter ego as to the Defendant LLOYD D. BRINKMAN, there is no evidence that LDBRINKMAN CORPORATION would be unable to satisfy any judgment that might be entered against the corporation and thus, as a matter of law, LDBRINKMAN CORPORATION cannot be the alter ego of LLOYD D. BRINKMAN. *See Lucas* v. *Texas Industries, Inc.*, 696 S.W.2d 372 (Tex. 1984); *Hanson Southwest Corp.* v. *Dal-Mac Construction Co.*, 554 S.W.2d 712 (Tex. Civ. App.—Dallas 1977, writ ref's n.r.e.).

Where a parent corporation totally dominates and controls a subsidiary, operating the subsidiary as its business conduit or agent, the subsidiary is considered the alter ego of the parent company. The factors to be used

in determining whether a subsidiary is the alter ego of its parent include whether parent and subsidiary have common stock ownership, common directors or officers, and common business departments; whether parent and subsidiary filed consolidated financial statements and tax returns; whether parent finances subsidiary; whether parent caused incorporation of subsidiary; whether subsidiary operates with grossly inadequate capital; whether parent pays salaries and other expenses of subsidiaries; whether subsidiary receives no business except that given to it by the parent; whether parent uses subsidiary's property as its own; whether daily operations of the two are kept separate; and whether subsidiary does not observe basic corporate formalities. *U.S.* v. *Jon-T Chemicals, Inc.*, 763 F.2d 686 (5th Cir.1985).

The Court finds that Plaintiff failed to present any evidence that Brinkcraft Development Inc. was the alter ego of LDBRINKMAN CORPORATION and failed to present sufficient evidence to support the jury finding that Brinkcraft Inc. was the alter ego of LDBRINKMAN CORPORATION.

The Court further finds that the Defendants have failed to meet their burden of proof with respect to their usury counterclaim. The essence of the counterclaim is that GIBRALTAR set forth a demand for interest on the contract (i.e. the $5,000,000.00 note) when no interest was due. As a non-obligor, Defendant BRINKMAN lacks standing to assert the statutory penalties for usury, Greenway Bank and Trust of Houston v. Smith, 679 S.W. 2d 592 (Tex. App.—Houston [1st Dist.] 1984, no writ). A reading of the First and Second Amended Complaints show [sic] that interest *eo nomine* on the contract was sought only from the maker and guarantor and not from BRINKMAN or the Parent Corporation.

Moreover, the Court finds there was no evidence of "charging" within the meaning of the statute. *Missouri-*

Kansas Texas Railroad Company v. *Fiberglass Insulators*, 707 S.W.2d 943, 950 (Tex. App.—Houston [1st Dist.] 1986, no writ). Nor was any evidence offered as to any calculations of damages for the alleged usury. In sum, no evidence was offered in support of the usury counterclaim. Accordingly, the Court enters Judgment for the Plaintiff on the Defendants' counterclaim for usury.

The Court further finds that Plaintiff GIBRALTAR SAVINGS is entitled to recover attorneys' fees and court costs from Defendant LDBRINKMAN CORPORATION in the sum of $332,500. The Court finds that this action is one "sounding in contract", and, therefore, attorneys' fees are recoverable under § 38.001 of the Texas Civil Practice and Remedies Code. *See Milton v. Aransas Shrimp Co-op*, 668 S.W.2d 735 (Tex.App.—Corpus Christi 1983, error dism'd). *See also Collin County Savings & Loan v. Miller Lumber Company, Inc.*, 653 S.W.2d 114 (Tex.App.—Dallas, 1983, no writ). A separate Judgment concerning attorneys' fees shall be entered.

For all of which let execution issue if not timely paid.

All other relief not expressly granted here is DENIED.

This Judgment supersedes the Final Judgment entered on August 6, 1987, but same is nunc pro tunc for such Judgment, and is entered because of an error in the amount of attorneys' fees awarded.

SIGNED and ENTERED this 12th day of August, 1987.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
United States District Judge

APPENDIX E

Verdict Form *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

No. SA-85-CA-2166

GIBRALTAR SAVINGS

v.

LDBRINKMAN CORPORATION and LLOYD D. BRINKMAN

VERDICT FORM

Answer all of the following questions from a preponderance of the evidence.

1. Do you find that LDBRINKMAN CORPORATION committed fraud against GIBRALTAR SAVINGS by making any of the following alleged misrepresentations:

ANSWER "YES" OR "NO" AS TO EACH.

(a) That the total existing debt of Brinkcraft Inc. other than debt owing to LDBrinkman Corporation, did not exceed $2,500,000.

Answer: Yes.

(b) That the business of Brinkcraft, Inc. and Brinkcraft Development, Inc. was ongoing and successful in scope.

Answer: Yes.

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* C.A. Record Excerpts for Appellants (Vol. 1), pp. 52-57.

(c) That all debt of Brinkcraft Development, Inc. and Brinkcraft, Inc. to the parent company, LDBrinkman Corporation, would be subordinated to the new debt to be created in favor of Gibraltar Savings.

Answer: No.

(d) That $2,500,000 of the $5,000,000 line of credit would be used as working capital to finance the completion of Brinkcraft Development, Inc.'s existing projects.

Answer: No.

(e) The sale of Brinkcraft Development, Inc.'s development project would be the primary source of repayment of the line of credit.

ANSWER: No.

ANSWER QUESTION NO. 2 ONLY IF YOU ANSWERED "YES" TO ANY PART OF QUESTION NO. 1, OTHERWISE SKIP TO QUESTION NO. 5.

2. What amount of money, if paid in cash, do you find would fairly and reasonably compensate GIBRALTAR SAVINGS for the fraud, if any, committed against it by the LDBRINKMAN CORPORATION?

ANSWER: 6,000,000.00

ANSWER IN DOLLARS AND CENTS OR "NONE".

ANSWER QUESTION NO. 3 ONLY IF YOU ANSWERED "YES" TO ANY PART OF QUESTION NO. 1, OTHERWISE SKIP TO QUESTION NO. 5.

3. Do you find that LDBRINKMAN CORPORATION acted with malice, willfullness or callous and reckless indifference to the rights of GIBRALTAR SAVINGS?

ANSWER "YES" OR "NO".

ANSWER: Yes.

ANSWER QUESTION NO. 4 ONLY IF YOU ANSWERED "YES" TO QUESTION NO. 3, OTHERWISE SKIP TO QUESTION NO. 5.

4. What amount of money, if paid now in cash, do you find should be awarded against the Defendant LDBRINKMAN CORPORATION as punishment for such fraud, if any?

ANSWER: None.

ANSWER IN DOLLARS AND CENTS OR "NONE".

5. Do you find that the Defendant(s) wrongfully interfered with the contractual obligation of Brinkcraft Development, Inc. under its note to GIBRALTAR SAVINGS?

ANSWER "YES" OR "NO" AS TO EACH DEFENDANT.

LDBRINKMAN CORPORATION Yes.

LLOYD D. BRINKMAN No.

ANSWER QUESTION NO. 6 ONLY IF YOU ANSWERED "YES" TO ANY PART OF QUESTION NO. 5, OTHERWISE SKIP TO QUESTION NO. 9.

6. What amount of money, if paid now in cash, do you find would reasonably and fairly compensate GIBRALTAR SAVINGS for the damages, if any, it sustained as a result of the wrongful interference by the Defendant(s)?

ANSWER: None.

ANSWER IN DOLLARS AND CENTS OR "NONE".

ANSWER QUESTION NO. 7 ONLY IF YOU ANSWERED "YES" TO ANY PART OF QUESTION NO. 5, OTHERWISE SKIP TO QUESTION NO. 9.

7. Do you find that the Defendant(s) acted with actual malice?

ANSWER "YES" OR "NO".

ANSWER: No.

ANSWER QUESTION NO. 8 ONLY IF YOU ANSWERED "YES" TO QUESTION NO. 7, OTHERWISE SKIP TO QUESTION NO. 9.

8. What amount of money, if paid now in cash do you find should be awarded against the Defendant(s) as punishment for wrongful interference?

ANSWER: ——.

ANSWER IN DOLLARS AND CENTS OR "NONE".

9. Do you find that Brinkcraft Development, Inc. is (or was during the events made the subject of this case) the alter ego of Brinkcraft Inc?

ANSWER "YES" OR "NO".

ANSWER: Yes.

10. Do you find that Brinkcraft Development, Inc. is (or was during the events made the subject of this case) the alter ego of the LDBRINKMAN CORPORATION?

ANSWER "YES" OR "NO".

ANSWER: Yes.

11. Do you find that Brinkcraft Inc. is (or was during the event [sic] made the subject of this case) the alter ego of the LDBRINKMAN CORPORATION?

ANSWER "YES" OR "NO".

ANSWER: Yes.

12. Do you find that LDBRINKMAN CORPORATION is (or was during the events made the subject of this case) the alter ego of LLOYD D. BRINKMAN?

ANSWER "YES" OR "NO".

ANSWER: Yes.

13. Do you find that the Defendant(s) violated section 1962(c), Title 18, U.S. Code—The RICO Act?

ANSWER "YES" OR "NO" AS TO EACH DEFENDANT.

LDBRINKMAN CORPORATION: No.

LLOYD BRINKMAN: No.

ANSWER QUESTION NO. 14 ONLY IF YOU ANSWERED "YES" TO ANY PART OF QUESTION NO. 13, OTHERWISE STOP.

14. What amount of money, if paid now in cash, do you find would fairly and reasonably compensate GIBRALTAR SAVINGS for its damages, if any, proximately caused by the Defendant(s)'s violation of the RICO Act?

ANSWER: ——.

ANSWER IN DOLLARS AND CENTS OR "NONE".

/s/ Delma Gonzales
Foreperson

DATE: 5-29-87

APPENDIX F

Plaintiff's Proposed Special Issue *
(Hand Written—File Stamped)

Special Issue

(f) That LDBrinkman Corporation would not sell or dispose of Brinkcraft, Inc until the $5,000,000 loan was repaid.

Denied

/s/ Lucius D. Bunton

[Filed May 27, 1987]

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* C.A. Combined Supplemental Record Excerpts of Appellant and Cross-Appellees, p. 372.

APPENDIX G

Second Amended Final Judgment of the District Court

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-85-CA-2166

GIBRALTAR SAVINGS, A California Corporation

v.

LDBRINKMAN CORPORATION and
LLOYD D. BRINKMAN, Individually

Second Amended Final Judgment

[Filed Mar. 17, 1989]

BEFORE THIS COURT is Gibraltar Savings' Motion for Entry of Amended Judgment after Remand in the above-numbered cause. The cause was tried to a jury verdict on May 29, 1987.

An appeal commenced and on December 2, 1988 the United States Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded to this Court with instructions to this Court to redetermine the correct amount of the Judgment by (1) deleting the attorney's fees, (2) allowing a credit for any recovery which Gibraltar might have received from the Brinkcraft Judgment or from Ben D. Woody or Delbert G. McDougal and increasing the amount of the judgment by an appropriate amount of prejudgment interest pursuant to state law.

Woody and McDougal are the persons with whom Gilbraltar agreed on June 1, 1988, to offset any direct

recovery from LDBrinkman Corp or Brinkman against the agreed judgment of $5,000,000 and $5000 attorney's fees entered by this Court to prevent double recovery by the lender, Gilbraltar. The Fifth Circuit recited in footnote 61 *Gibraltar Savings v. LDBrinkman*, 660 F.2d 1306, (5th Cir. 1988) the principle that to avoid a double recovery to the lender, this Court must factor into the final judgment the value that Gibraltar recovered or may recover on the assignments made by Woody and McDougal. The Fifth Circuit expressly determined that this Court correctly entered judgment in favor of Gibraltar and against LDBrinkman Corporation for $5,000,000 representing the principal amount due on the Gibraltar note from BDI.

These tasks are strictly ministerial, the remand contemplated the accomplishment of only this limited purpose. The Court finds that no amounts have been received from the Woody and McDougal assignment. There is no manner in which this Court could reduce the value of the judgment by the undetermined future value of the Woody and McDougal assignment. The stipulation should be accorded its full purpose; any recovery from Woody and McDougal shall be counted as an offset in favor of LDBrinkman of those funds which are due Gibraltar.

Texas Courts allow the recovery of interest as damages in compensation for the loss of use of the money between the date the claim accrues and the date the judgment is entered. The interest rate allowed under *Cavnar v. Quaiity Control Parking, Inc.*, 696 S.W.2d 549, 552-53 (Tex. 1985) and as extended by *Perry Roofing Co. v. Olcott*, 744 S.W.2d 020 [should be 929] (Tex. 1988) is ten percent per annum. There is no reason to depart from this figure and accordingly, ten percent per annum on the principle sum of $5,000,000 from August 15, 1985 to this date is appropriate. No attorney's fees shall be added. The entire sum shall bear interest from

this date until satisfaction at the rate of 9.32 percent per annum. Let execution lie if not timely paid.

Whether the parties agree to assign the value of the Brinkcraft judgment now or in the future is not the concern of this Court. It shall not be assigned by Order of this Court.

SO ORDERED, ADJUDGED AND DECREED, this, the 13th day of March, 1989.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
Chief Judge

Supreme Court, U.S.
FILED
MAY 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1644

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LDB CORPORATION,
Petitioner,

v.

GIBRALTAR SAVINGS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

RESPONSE TO PETITIONER'S STATEMENT OF THE QUESTION PRESENTED

Believing the Petitioner's statement of the question presented is inaccurate, Respondent states the question as follows:

Whether the Court of Appeals' affirmance of the judgment based on fraud and tortious interference violates the Seventh Amendment right to trial by jury where (i) the jury in this diversity case was properly instructed on the elements of "false statement" and "false promise" under Texas law; (ii) the Petitioner (Defendant in the district court) did not object to the instructions and did not challenge them on appeal; (iii) the evidence was overwhelming in support of the contention of Respondent (Plaintiff in the district court) that, in the context of the dealings between the parties, the Respondent's representations were false, material, and Respondent relied upon them to its detriment; and (iv) the error in the jury's award of damages was corrected by the Court of Appeals in its order of remand directing the district court to enter judgment for Respondent's proved loss, increased by interest allowed under Texas law and reduced by any credits actually received by Respondent from certain other parties, the effect being to render harmless the jury's error in awarding a greater sum of damages.

PARTIES TO THE PROCEEDING

The Petitioner, LDB Corporation (sometimes referred to in this brief as "LDB"), was formerly known as LD Brinkman Corporation, a corporation chartered and existing under the laws of the State of Texas. Lloyd D. Brinkman ("Brinkman") is LDB's chairman and chief executive officer.

Gibraltar Savings, a California corporation ("Gibraltar"), is a savings and loan association, chartered and existing under the laws of the State of California.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NO. 88-1644

LDB CORPORATION,
Petitioner,

v.

GIBRALTAR SAVINGS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gibraltar Savings replies to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming in part and reversing in part the decision of the United States District Court for the Western District of Texas in this cause and remanding the case to the district court for further proceedings.

STATEMENT OF THE CASE

An understanding of why there is no error presented in this case—much less one of constitutional dimensions

as required under S. Ct. R. 17.1(a)—begins with understanding the facts which brought Respondent to court in the first place and sufficiently impressed the jury to find in Gibraltar's favor on two counts of fraud and one of tortious interference with contract. These facts are set forth in considerable detail in the opinion of the Court of Appeals. (App. 19a-65a). One fact, however, is central: Gibraltar made a loan to a wholly owned subsidiary of the Petitioner based on the fraudulent representations of the latter's chief financial officer. Gibraltar's loan officer never even met the officers of the borrower or guarantor, much less negotiated with them over any terms of the loan. Gibraltar has never been repaid because of Petitioner's dominance over its former (and now bankrupt) subsidiaries, and the result is the same whether measured on an "out-of-pocket" theory or the "benefit of the bargain" rationale. With those facts prominently displayed, it is a simple matter to understand why the jury found as it did and the district court and the Court of Appeals upheld that verdict. The irony in this case is that under the guise of upholding the Seventh Amendment, it is Petitioner who would have this Court depart from the provisions of that Amendment by re-examining the facts as found by the jury to reach a result expressly contrary to those findings.

On page 5 of its Petition, LDB emphasizes a portion of the Court of Appeals' opinion to bolster its claim the Court of Appeals improperly drew on evidence pertaining to a court-rejected special interrogatory to sustain the fraud finding on which the judgment ultimately was upheld. LDB omits from its quotation the beginning of that paragraph in which the appeals court observed:

> "The jury was properly instructed on the elements required of both the 'false statement' and 'false promise' strands of Texas law. *Indeed, the Defendants did not object to, and do not now challenge, the jury instructions on this issue.*"

App. 53a (emphasis added). LDB also selectively ignores much of the Fifth Circuit's exposition of the evidence (App. 54a-56a) in rejecting Petitioner's legal contention that the " 'ongoing and successful' statements were merely expressions of opinion and not promises as to existing facts required to impose liability for fraudulent inducement to contract." App. 57a. The Fifth Circuit further observed:

> "That Ratcliffe [Petitioner's chief financial officer] 'promised' continued financial backing by the holding company [Petitioner] is as apt a characterization of the questioned remarks as that they were, and were intended to be, personal opinions about future profitability and fiscal health. The materiality of such financing is undisputed, and that Gibraltar made inquiries of this nature and expressed concern over the holding company's intentions was testified to by both Hollingsworth [Gilbraltar's vice president] and Farlow [Gibraltar's loan officer]. Inferences reasonably drawn from these facts lead us to conclude that—in context—Ratcliffe's representations were not merely non-actionable statements of opinion." [Citation omitted.]

App. 57a. As the Fifth Circuit appropriately noted, in the context of this case, the representation concerning the "ongoing" nature of the subsidiary was hardly an "ambiguous expression of opinion" as suggested by Petitioner. App. 56a.

Petitioner correctly notes that the Court of Appeals found as an independent ground to sustain the judgment (as reformed) the jury's finding that LDB had wrongfully interfered with Gibraltar's loan contract with the subsidiary, although the jury found no separate damages. The trial court harmonized the apparent inconsistency of the "no damage" finding on the tortious interference issue with the remainder of the verdict in which fraud and actual damages were found. Again, by selectively emphasizing statements drawn from the opinion of the Court of Appeals, Petitioner infers that the appellate court misconstrued the jury verdict. LDB quotes out of context (Petition, p. 7 n.6) the Fifth Circuit's statement concerning the amount of the judgment. From the surrounding text and the opinion as a whole, it is obvious that the Fifth Circuit was fully aware that the jury verdict was for $6.0 million and not $5.0 million. However, what the court was expressing was its finding that only the $5.0 million component of the verdict was justified by the evidence.

In a similar vein, Petitioner erroneously tells this Court that the Fifth Circuit "rejected the out-of-pocket theory on which the jury had been instructed with reference to the fraud claim." (Petition, p. 6). In fact, what the appeals court rejected was LDB's theory that Gibraltar had the affirmative burden to *dis*prove LDB's fanciful assertion that the guaranties were worth the equivalent of the loan and therefore were "security" for the loan. Finding that the straight loan of money does not implicate the out-of-pocket limit on damages appropriate in actions under the securities laws, the Fifth Circuit rejected LDB's effort to shift from itself the burden of proof on what is essentially an affirmative defense. App. 62a.

In the argument which follows, Respondent will demonstrate why the Court of Appeals was correct in affirming the jury verdict and that now to disturb that judgment (as reformed and reduced by the appeals court) would contravene the very injunction of the Seventh Amendment to preserve inviolate the right to trial by jury.

REASONS FOR DENYING THE WRIT

To keep a sense of perspective in reviewing this case, it would be well to begin with Petitioner's conclusion that the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S. Ct. R. 17.1(a). In reaching this conclusion, Petitioner claims not only did the Court of Appeals commit fundamental error, but predicts the most dire consequences to the right of trial by jury. Its premise is unwarranted; its prediction is absurd. In upholding the district court judgment, the Court of Appeals did no more than sustain the result which the jury intended and which is fully supported by the evidence.

A. THE COURT OF APPEALS CORRECTLY AFFIRMED THE JUDGMENT BASED ON THE JURY VERDICT OF FRAUD.

The linchpin of Petitioner's argument (and its fatal flaw) is contained in a statement on page 10 of its Petition: "The present case involves action not by the trial judge, but by the Court of Appeals on review of a jury's verdict." The Court of Appeals *affirmed* the trial court judgment. Had the Court of Appeals *reversed* the judgment, Petitioner's argument that the Court of Appeals

"reexamined" the verdict contrary to the rules of the common law and thus, violated the Seventh Amendment, would make more sense. But in this factual setting, the argument is a *non sequitur*.

To illustrate this gap in the logic of Petitioner's reasoning, the Court may look to Fed. R. App. P. 47, and in particular, the Fifth Circuit's local rule 47.6, *"Affirmance Without Opinion,"* which provides in part:

> "When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: . . . (2) That the evidence in support of a jury verdict is not insufficient . . . and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."

Suppose in this case, the Fifth Circuit had, under the provisions of its local rule 47.6, entered its order as: "AFFIRMED. *See* Loc. R. 47.6."[1] In that event, Petitioner's counsel would have to be mind readers to know that the appellate court took the tortuous path on which Petitioner now claims the Court traveled to reach its ruling. Yet, the effect is precisely the same because the reviewing court would implicitly have found sufficient evidence to sustain the jury verdict and no error of law in the judgment.

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1. This procedure has repeatedly been upheld by the Fifth Circuit itself. *See*, e.g. *George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.*, 502 F.2d 1045 (5th Cir. 1974). The procedure is at least implicitly condoned by this Court. *See, F.C.C. v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275, 69 S. Ct. 1097, 1103, 93 L.Ed. 1353 (1949).

Had the Fifth Circuit affirmed without expressing its rationale, Petitioner would be left with no basis to argue its sole point before this Court that the Court of Appeals *reasoning* is at variance with that employed by the district judge to reach precisely the same result. As Petitioner does not appear to question the sufficiency of the evidence (*see,* Petition, p. 18), its entire complaint is founded on the premise that the Fifth Circuit's logic was flawed in reaching a correct result.

Assuming *arguendo* the validity of Petitioner's assertion, i.e. the Court of Appeals reached its judgment through improper reasoning, the logical extension of this theory would have the Supreme Court obliged to scrutinize with microscopic perfection, every opinion of the lower courts to ensure that not only are their judgments correct, but also every statement of the law precisely correct, regardless of how inconsequential the point to the judgment at hand or the general body of jurisprudence as well. Obviously, such a result is neither desirable nor possible. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S. Ct. 614, 99 L.Ed. 897 (1955); *Fay v. Noia,* 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963). Hence, in the context of this case, it surely does no violence to the Seventh Amendment for the Fifth Circuit to have *upheld* the jury verdict and, in substance, the judgment which resulted from it.

Approaching Petitioner's premise from another direction, the flaws in its reasoning are equally apparent. Fed. R. Civ. P. 49(a) allows the use of the special verdict at the discretion of the trial court. *Chemetron Corp. v. Business Funds, Inc.,* 682 F.2d 1149, 1171 (5th Cir. 1982). In the Fifth Circuit, the use of the Rule 49(a)

verdict is especially encouraged. *See,* Brown, *Federal Special Verdicts: The Doubt Eliminator,* 44 F.R.D. 338, 344 (1967). However, the trial court also has discretion over the nature and scope of the issues submitted, a discretion reviewable only for abuse. *Loffland Bros. Co. v. Roberts,* 386 F.2d 540, 546 (5th Cir. 1967), *cert. denied,* 389 U.S. 1040, 88 S. Ct. 778, 19 L.Ed.2d 830 (1968). The criteria employed in appellate review of a special verdict are (i) whether, when read as a whole and in conjunction with the general charge, the interrogatories adequately present the contested issues for the jury to consider; (ii) whether the submission of the issues was "fair"; and (iii) whether the "ultimate questions of fact" are clearly submitted. *Dreiling v. General Electric Co.,* 511 F.2d 768, 774 (5th Cir. 1975). Although the trial judge is obliged to submit all material issues raised by the pleadings and the evidence, no issue must be twice submitted through redundant special interrogatories. *Chemetron, supra,* 682 F.2d at 1171; *Angelina Casualty Co. v. Bluitt,* 235 F.2d 764, 770 (5th Cir. 1956). Moreover, there is no requirement that because an issue may be important to the outcome of a case, the jury must be instructed to supply a specific answer informing the court of how they resolved a particular issue. No party is entitled to a special verdict on each of the multi-faceted, multitudinous issues essential to the resolution of a given case. *Miley v. Oppenheimer & Co.,* 637 F.2d 318, 334 (5th Cir. 1981).

Under those criteria, it is apparent that the trial judge correctly submitted the issues to the jury, or at least, any error in the submission does not rise to the level of an abuse of discretion. Petitioner makes much of the trial judge's refusal to submit an interrogatory requested by

Respondent inquiring if the jury believed that LDB represented that it "would not sell or dispose of Brinkcraft, Inc., until the $5.0 million was paid." (App. 80a). At trial, LDB made no objection to the court's refusal to submit this interrogatory and on appeal, made no complaint that its submission would have been the preferred phraseology as compared to the "ongoing and successful" submission (App. 75a). Both LDB and Brinkman made numerous objections to the charge, but at no time did either complain of the court's refusal to submit the interrogatory tendered by Gibraltar either in addition to or in place of special interrogatory 1(b). Petitioner's failure to object precludes its claim of error. *See, Weinar v. Rollform, Inc.*, 744 F.2d 797, 809 (Fed. Cir. 1984); *Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446, 1453 (Fed. Cir. 1984). In a civil case, each party must live with the legal theory reflected in the instructions to which it does not object. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 675 (7th Cir. 1985); *Davis v. Consolidated Rail Corp.*, 788 F.2d 1260, 1268 (7th Cir. 1986). Where no objection is made to the instructions given at trial, the substance of those instructions becomes a part of the law of the case. *United States v. Atkinson*, 297 U.S. 157, 159, 56 S. Ct. 391, 392 (1936); *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1477 (10th Cir. 1985); *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963). In the *Firestone* case, an apparently ambiguous phrase was left undefined in the court's instructions to the jury, leaving them to determine the meaning of the phrase in the context of the facts of the case. The court of appeals held that by returning a verdict for one of the parties, the jury "clearly resolved" the ambiguity in favor of the prevailing party. *Firestone*, 769 F.2d at 1478.

Under Fed. R. Civ. P. 49(a), each party waives the right to a jury trial on any omitted issue unless before the jury commences its deliberations the objecting party demands a proper submission. Obviously, Petitioner cannot benefit from Respondent's proffered interrogatory. Moreover, the same rule grants to the trial judge the power to make a finding on an omitted issue, and where it fails to do so, the trial court is deemed to have made a finding in accord with the judgment on the special verdict. *General Ins. Co. of America v. Fleeger,* 389 F.2d 159, 163 (5th Cir. 1968); *see also, Graphic Products Distributors, Inc. v. ITEK Corp.,* 717 F.2d 1560, 1582 n. 41 (11th Cir. 1983).

It is evident that the omitted interrogatory was cumulative of the other false representations found by the jury. Clearly the Court of Appeals—and apparently the district court—believed that its submission was at best redundant and therefore, unnecessary. As the appeals court observed:

> "While a representation regarding the 'ongoing' nature of subsidiaries which a parent corporation is selling to the subsidiary's officers would not necessarily be false, in the context of this case, these representations were hardly 'ambiguous expressions of opinion' as suggested by LDBrinkman Corp. [footnote omitted].

App. 56a. Rejecting Petitioner's contention that those statements were mere expressions of opinion, the Fifth Circuit properly held that the implication of continued financial backing by the parent company is "as apt a characterization of the questioned remarks as that they were, and were intended to be, personal opinions about future profitability and fiscal health." (App. 57a). Infer-

ences drawn from these facts properly led the jury, the district court, and the Fifth Circuit to conclude that the representations of Petitioner's chief financial officer were not merely non-actionable statements of opinion. *Valdes v. Leisure Resource Group,* 810 F.2d 1345, 1350 (5th Cir. 1987).

The Seventh Amendment permits the jury to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. *Galloway v. United States,* 319 U.S. 372, 396, 63 S. Ct. 1077, 1090 (1943). It is presumed on appellate review of jury instructions that the jury acted in accordance with the instructions given them. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 604, 105 S. Ct. 2847, 2858, 86 L.Ed.2d 467 (1985). It is also presumed that the jury does not consider or base its decision on legal questions with respect to which they are not charged. *City of Los Angeles v. Heller,* 475 U.S. 796, 106 S. Ct. 1571, 1573 (1986). If there is any conflict in the verdict, it is the duty of the courts to attempt to harmonize the answers if such is possible under a fair reading of them. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 364, 82 S. Ct. 780, 786, 7 L.Ed.2d 798 (1962); indeed it is the court's duty to reconcile the jury's findings "by exegesis if necessary" as in *Gallick v. Baltimore & Ohio R.R. Co.,* 372 U.S. 108, 119, 83 S. Ct. 659, 666 (1963); *Arnold v. Panhandle & S.F. R. Co.,* 353 U.S. 360, 77 S. Ct. 840, 1 L.Ed.2d 889 (1957); *Perry v. Stewart Title Co.,* 756 F.2d 1197, 1205 (5th Cir. 1985); *McVey v. Phillips Petroleum Co.,* 288 F.2d 53 (5th Cir. 1961).

While here there was no "inconsistency" between any particular answers in the special verdict, the principles

of reconciliation apply with equal force. The jury clearly found fraud and tortious interference. On even a casual reading of the trial record, it is indisputable that there was sufficient evidence to support either finding. Following the well established mandate to harmonize the verdict where necessary, both the district court and the Fifth Circuit correctly ruled that it was the jury's intention to avoid awarding Gibraltar a "double recovery" for what was undeniably but one loss in the undisputed principal amount of $5.0 million.

Against this framework of the roles of the jury, the trial judge, and the Court of Appeals, the Supreme Court may examine critically Petitioner's claim that the Court of Appeals "found and relied upon facts additional to those found by the jury in response to the interrogatories submitted to it." (Petition, p. 11). The glaring problem with that analysis is that what Petitioner really seeks is for *this* Court to do what it requested of the trial judge in its motion for judgment notwithstanding the verdict and of the Court of Appeals on the appeal: find an insufficiency of the evidence to support the jury's answer finding fraud based on the particular representation that the subsidiary was ongoing and successful in scope. Both courts rejected that suggestion. In a footnote (*see* Petition, p. 12, n.15), Petitioner dismisses the Rule 49(a) problem by arguing that the rejected special interrogatory (App. 80a) was a *distinct* basis for a fraud claim (emphasis by Petitioner). From that premise flows Petitioner's contention that this "separate" claim was not encompassed within the jury's verdict as a matter of logical or legal necessity.

In the first place, in the factual context of this case, while the two questions are not identical, they are cer-

tainly overlapping and redundant to a significant degree. In either instance, the jury was simply asked to determine if the representations made by Petitioner's chief financial officer wrongfully implied to Gibraltar that LDB intended to continue the subsidiary as an ongoing enterprise until the loan was repaid. This is at least as reasonable a construction as that suggested by Petitioner and one which is wholly consistent with the evidence and the jury's intention to find for Respondent.

In the second place, even if the two interrogatories were so divergent as to be wholly unrelated and independent bases for fraud, no error is presented which would warrant remanding this case for a new trial. There was undeniably sufficient evidence to uphold the jury verdict on the interrogatory which the jury did answer favorably to Gibraltar and which was not tainted by the confusion of names present in the other favorably-answered interrogatory. (*See* App. 50a-52a). Petitioner's argument is simply that evidence which would have supported a favorable finding on the unsubmitted interrogatory cannot be viewed as supporting the one which was submitted and answered favorably to Gibraltar. This argument makes no sense and does not warrant Petitioner's conclusion that the appeals court "relied on other statements, introduced in evidence, but never found by the jury, in order to sustain liability." (Petition, p. 12). No additional fact-*finding* process is involved; rather, the Court of Appeals merely examined the evidence to determine its sufficiency to sustain the favorable finding.

In the third place and finally, Petitioner never complained at trial or on the appeal that the instructions were incorrect, that the omitted interrogatory should have been submitted in addition to or in place of one or more

of the fraud questions, and does not here question the sufficiency of the evidence to sustain the favorable finding.

In summary under this point, the word "ongoing" in the factual context of this case had the meaning attributed to it in the first instance by the parties who negotiated the loan and thereafter, by all the participants in the trial. The term simply meant that LDB would maintain the primary guarantor as an ongoing subsidiary until the loan was repaid. If the term was ambiguous, the time to have objected to it was prior to the jury retiring to deliberate its verdict. Fed. R. Civ. P. 49(a) and 51; *Firestone, supra,* 769 F.2d at 1477.

Petitioner claims that the alleged fact-finding process in which the Court of Appeals is supposed to have indulged is "an affront not only to the jury process, but to the authority of the district court." (Petition, p. 15). To the contrary, the only affront to either would be where the Court of Appeals improperly reexamined the verdict to overturn what the properly instructed jury found to be a fraudulent representation and upon which the trial judge properly entered judgment.

B. THE COURT OF APPEALS DID NOT ERR IN REVISING THE DAMAGE AWARD.

In complaining that the Fifth Circuit rewrote the jury's damage award, Petitioner emphasizes the distinction in the respective measures of damage for fraud versus tortious interference and assumes (without justifying) that the two are mutually exclusive. Again, with reference to the facts of this case, it is a distinction without a difference. Either measure of damage produces exactly the same result: Gibraltar loaned $5.0 Million and got back noth-

ing. Following their instructions on the *fraud* theory, the jury could not have returned any verdict less than $5.0 Million plus the approximately $787,000.00 to which Gibraltar testified (without contradiction) was the interest which would have accrued on the note to the date of trial. Under the instructions of *tortious interference*, the jury could have arrived at the same or a lesser figure based on the evidence. But had they chosen to award *separate* damages for the tortious interference, and had the Court entered judgment accordingly, it is obvious that Petitioner would now be complaining that Gibraltar was awarded a "double recovery" for what was undeniably a single loss in the undisputed amount of $5.0 Million.

Regardless of which finding is viewed in support of the judgment, it is clear that Gibraltar's loss from either the fraud or the tortious interference was the amount of money which it was unable to collect due to Petitioner's illegal acts.

Petitioner complains (*see* Petition, pp. 16-17) that Gibraltar failed to prove the value of the guarantees from the individual company officers. Again, Petitioner would have this Court shift the burden of proof on an affirmative defense and require that Gibraltar prove a negative. Wholly apart from the fact Gibraltar was not required to do so, it did produce evidence that the guarantors would have been forced into personal bankruptcy had Gibraltar pressed them for payment. (App. 62a). The Court of Appeals correctly held that Gibraltar is under no legal compulsion to seek payment against all guarantors or any one of them. *United States v. Kohn*, 243 F.Supp. 293, 296 (W.D.S.C., 1965).

Ignoring the error of its assumptions, Petitioner submits the conclusion is "inescapable" that the appeals

court directed a verdict in favor of Gibraltar on a formula which it devised to fit the facts of this case and in a footnote (Petition, p. 17, n.20) suggests the jury might have found no damages under the tortious interference theory by allowing for setoff of any amounts received by Gibraltar in connection with the claim. The absurdity of this suggestion is apparent from the fact Gibraltar never received *anything* from any source other than the assignment of partnership interests made as a part of its settlement with the individual guarantors, Ben Woody and Delbert McDougal. As shown by the Second Amended Final Judgment (App. 81a) the district court has, since the Fifth Circuit's remand, determined that "no amounts have been received from the Woody and McDougal Assignment" (App. 82a). If there were some value received from *any* source, there certainly was no evidence adduced at trial and LDB has yet to demonstrate any payment on the principal balance of the loan from any source whatsoever. Now to suggest to this Court that the appeals court should have speculated that the jury might have been considering non-existent setoffs makes no sense in the factual context of this case. From the evidence, the only plausible inference which the Court of Appeals could have made—consistent with its duty to harmonize any apparent inconsistency in the verdict—was that the jury intended to avoid awarding Gibraltar a double recovery of some or all of a single loss of $5.0 Million. In so doing, the appeals court did not engage in fact finding or directing a verdict, but rather upheld the jury's manifest intent that Gibraltar be restored what it had lost through Petitioner's unlawful conduct.

Even were all of Petitioner's complaints valid, the error is harmless. In remanding the case to the district court

with instructions, the Court of Appeals did not add to the judgment, but rather took away $1.0 Million in damages which it found unsupported by the evidence. This Court has in substance approved the procedure followed in this case. *See Northern Pac. R. Co. v. Herbert,* 116 U.S. 642, 6 S. Ct. 590, 592 (1886); *Hansen v. Boyd,* 161 U.S. 397, 16 S. Ct. 571, 576 (1896) (appellate court in reviewing judgment may permit prevailing party to avoid granting new trial on account of error affecting only a part of the judgment by entering remittitur as to the erroneous part where the court can clearly distinguish it). The Fifth Circuit's instructions to the district court were simply to revise the judgment to conform to the uncontested evidence in a manner consistent with the jury verdict that fraud and tortious interference were committed. The procedure which the Fifth Circuit followed in this case is not unprecedented or such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. *See e.g. Dixon v. International Harvester Co.,* 754 F.2d 573, 590 (5th Cir. 1985); *Harper v. Zapata Off-Shore Co.,* 741 F.2d 87, 93 (5th Cir. 1984); *Gorsalitz v. Olin Mathieson Chemical Corp.,* 429 F.2d 1033, 1046-47 (5th Cir. 1970); *Carlton v. H.C. Price Co.,* 640 F.2d 573, 582 (5th Cir. 1981).

In the Fifth Circuit, the well established rule is that the Court of Appeals is obliged to reduce the verdict to the maximum amount which the jury could properly have awarded. *Stapleton v. Kawasaki Heavy Industries, Ltd.,* 608 F.2d 571, 574 n.7 (5th Cir. 1979), *modified on other grounds,* 612 F.2d 905 (5th Cir. 1980); *Dixon v. International Harvester Co., supra,* 754 F.2d at 590. While admittedly the term "remittitur" does not expressly

appear in the Court of Appeals' opinion, the practical result is the same. The function of remittitur is to correct the injustice of an excessive verdict without the necessity of a new trial. *Glazer v. Glazer,* 278 F.Supp. 476, 482 (E.D. La. 1968) (function of remittitur is to take place of new trial when jury has arrived at verdict that would allow court to order new trial). In taking away from Gibraltar a portion of its damages as awarded by the jury, the Court of Appeals has not injured Petitioner and logically, only Respondent could have ground to complain. In accepting the judgment of the Court of Appeals, Gibraltar effectively accepts the correctness of the finding that its damages were $5.0 million and not the greater sum the jury awarded. In this respect, the case is unlike the procedure condemned in *Dimick v. Schiedt,* 293 U.S. 474, 55 S. Ct. 296, 301 (1935) where the district court effectively created an *additttitur* which this Court found to contravene the Seventh Amendment.

Since the *principal* amount of the damages was uncontroverted, the subtraction of *any* amount of interest and the instruction to recalculate the interest in a manner consistent with Texas law was a ministerial function which the court could perform as a matter of law—no fact finding process is involved. *Shingleton v. Armor Velvet Corp.,* 621 F.2d 180 (5th Cir. 1980) (appeals court order of remittitur where jury's error in awarding damages was obvious and correction merely mechanical); *Budge v. Post,* 643 F.2d 372 (5th Cir. 1981); *Carlton v. H.C. Price Co.,* 640 F.2d 573 (5th Cir. 1981) (court of appeals' right to fix remittitur is same as that of trial court). How the reduction of the judgment could harm LDB is beyond rational comprehension. The only basis on which LDB's complaint can be justified is under the

premise that it wants to reexamine the verdict and gain a new trial before a jury hopefully more favorable to its position. If there is error in the manner in which the Court of Appeals remanded the case for redetermination of the interest applicable to the principal amount of the judgment, the error is not one of constitutional dimension nor even one which predicts "future episodic violations of the right to trial by jury." (*See* Petition p. 19).

CONCLUSION

Petitioner implicitly concedes that no ground exists for review on writ of certiorari in this case under S. Ct. R. 17 except for its assertion that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision. To support that conclusion, Petitioner has to ignore logic, the facts of the case and well established judicial precedent. It is not unreasonable to conclude that Petitioner's complaint is not so much with the judgment or the evidence which supports it but rather the method by which the Court of Appeals arrived at its conclusion upholding the jury verdict. As observed earlier, had the Court of Appeals arrived at the same judgment without an opinion, it is difficult to discern anything about which Petitioner could complain.

Respondent believes it significant that Petitioner makes no claim regarding the sufficiency of the evidence to sustain the verdict or the manner in which the jury was instructed, but alleges only that the appellate court arrived at its decision through an unprecedented "fact finding process" which destroyed the jury's verdict. Had there been an addittitur (instead of effectively, a remittitur) the complaint might have validity. As it stands, the contention is an exercise in sophistry.

In the final analysis, it is the Petitioner who would have this court re-examine the jury verdict and through a complex analysis not warranted by the evidence and the unchallenged jury instructions, destroy the verdict in contravention of the Seventh Amendment which Petitioner claims so boldly was violated. There are no grounds for granting a writ of certiorari in this case and the petition should be denied.

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No. 88-1644

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LDB CORPORATION,
Petitioner,
v.
GIBRALTAR SAVINGS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our petition, we showed how the court below revised the judgment for respondent by supplementing the jury's factual finding on which the judgment of fraud liability was based, and by modifying both the theory and the amount of the jury's fraud damage award—all in violation of petitioner's Seventh Amendment right to trial by jury. Respondent offers a number of opposing arguments.[1] In doing so, however, it provides confirma-

[1] Among respondent's arguments that review is unnecessary are the erroneous assertions that the court below merely affirmed and did not re-examine the jury verdict, Br. 5-6, and that it could have affirmed without opinion and thus should not be held accountable for whatever flaws are apparent in its decision. Br. 6. In the context of the present case, respondent thus asserts that an appellate court whose bottom-line conclusion on liability is the same as the jury's, and whose damage award is no larger than that of the jury,

tion that the court of appeals has seriously exceeded the limits on proper appellate court review, and has done this in a manner likely to mislead other courts if not corrected.

I

Respondent asserts repeatedly that the special interrogatory on which fraud liability depends—that the business of BI and BDI was "on-going and successful in scope"—is broad enough to include the further finding that petitioner promised to maintain the companies as on-going subsidiaries and provide financial support for them until the loan was repaid. Br. 10, 13, 14. Thus, respondent argues, the court of appeals merely upheld the verdict as returned by the jury, and did not rely on its own independent findings of fact.

This is not a reasonable reading of the jury finding. The representation as set forth in the interrogatory is simply a statement of present condition. It says nothing about any commitment or promise of support in the future and cannot reasonably be so understood. Respondent might have hoped that such support would be forthcoming, and the court of appeals cited evidence that petitioner in fact gave assurance that it would be.[2] But the statement found by the jury as a basis for fraud liability does not address that issue one way or the other. Indeed, the court of appeals conceded as much when it stated that "a representation regarding the 'on-going'

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is free to go beyond the jury's factual findings and to arrive at its own figure based on a theory different from the one submitted to the jury. Such an approach makes a mockery of the right to have the dispositive facts found by a jury in the first instance.

[2] Neither the loan contract nor any other written agreement contained any guaranty of payment or assurance of continued support by LDB Corporation. The suggestion by the court of appeals that oral assurances on behalf of petitioner could suffice to support the present action raises serious questions under the Texas statute of frauds. Tex. Bus. & Com. Code Ann. § 26.01(b)(6) (Vernon 1987).

nature of subsidiaries which a parent corporation is selling to the subsidiaries' officers [as here] would not necessarily be false . . . ." Pet. App. 56a.

It is no act of deference for the court of appeals to deprive the words of the jury's finding of their natural and apparent meaning in order to uphold the ultimate conclusion of liability. Instead, the court of appeals was obligated to review the sufficiency of the verdict in the terms in which it was entered, and thus determine whether the representation that BI and BDI were ongoing and successful—apart from any promise of future support by petitioner—was sufficient to sustain the fraud verdict.[3] We seek this Court's intervention in part to require that this be done.

II

With regard to the issue of damages, respondent suggests that what the court of appeals did here is consistent with the regular practice of the appellate courts and is no cause for alarm. Yet respondent is frank to acknowledge that the court of appeals instructed the district court "simply to revise the judgment to conform to the uncontested evidence." Br. 17. It notes that "the jury could not have returned any verdict less than $5.0 Million plus the approximately $787,000.00 [in interest]." Br. 14-15. If it were in fact the case that a jury could not reasonably reach any other verdict, then the standard for a directed verdict or a judgment notwithstanding the verdict would be met. But the court of appeals made no such finding, and in fact did not manifest any awareness that such a standard was applicable. It

[3] Respondent suggests that we are somehow barred from making this argument because we did not object to the special interrogatory on which liability rests. Br. 9. However, we have at no point suggested that that interrogatory was prejudicial or, for any other reason, should not have been submitted to the jury. We have only asserted a right to have the court of appeals determine whether the finding actually made by the jury sufficiently supports the conclusion of fraud liability.

should be required to take those steps if it really finds grounds to direct a verdict other than that returned by the jury.

III

Respondent also contends that the court of appeals did not find error in the jury instruction on calculating damages under the fraud theory, but only rejected "LDB's theory" that Gibraltar had to prove the value of guaranties received in security for the loan. Br. 4. The jury instruction provided, however, that the "measure of common law fraud damages is the difference between the value of what Gibraltar parted with and the value of what it received *on the date the loan was funded*." Pet. 16 n.18 (emphasis added). The court of appeals answered petitioner's assertion that respondent failed to establish the value of the property received by stating that "the straight loan of money without expectation of participating in the profits of the venture, as here, does not implicate the out-of-pocket limit on damages appropriate in actions under the securities laws." Pet. App. 62a. This statement is flatly inconsistent with the fraud instruction on which the jury's damage award was based.

IV

Analogizing this case to several where courts of appeals have entered remittiturs, Br. 17-18, respondent argues that there is nothing unprecedented about what the court of appeals did here. Of course, the court did not indicate that it was ordering a remittitur. Nor did it follow the accepted practice of entering an order for new trial under Federal Rule of Civil Procedure 59, to be vacated upon the plaintiff's acceptance of a reduced verdict. 6A Moore's Federal Practice ¶ 59.08[7], at 59-187-59-188 (1987). *E.g.*, *Harper* v. *Zapata Off-Shore Co.*, 741 F.2d 87, 93 (5th Cir. 1984); *Carlton* v. *H.C. Price Co.*, 640 F.2d 573, 582 (5th Cir. 1981). The court of

appeals did not enter a remittitur. It simply altered a damage verdict which it believed to be incorrect.

Furthermore, respondent offers no precedent for invocation of the remittitur procedure where the court of appeals concludes that the jury has been incorrectly instructed on the issue of damages. Remittitur is proper only where the jury was properly instructed but its award was excessive. When the jury has been improperly instructed, remand is required.

CONCLUSION

The decision below is a case study of the ways in which appellate courts, whether by design or inattention, can eviscerate and supersede the right to trial by jury. This Court's review is necessary in order to reestablish the proposition that appellate courts sit to review jury verdicts, not to rewrite them.

Respectfully submitted,

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